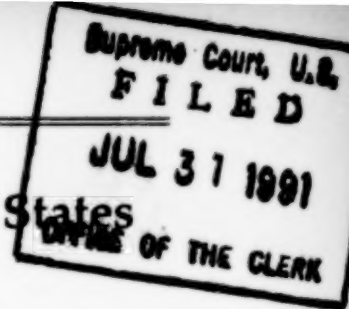


In The
Supreme Court of the United States
October Term, 1991



EASTMAN KODAK COMPANY,

vs.

Petitioner,

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.;
SHIELDS BUSINESS MACHINES, INC.; MICRO-
GRAPHIC SERVICES, INC.; MICRO MAINTENANCE,
INC.; ATLANTA GENERAL MICROFILM CO., INC.;
ROGER KATONA, d/b/a G. & S. ELECTRONICS;
AMTECH EQUIPMENT MAINTENANCE, INC.;
ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNI-
CAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX
EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.;
I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a
MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIP-
MENT & SERVICE, INC.; OMNI MICROGRAPHIC SER-
VICES, INC.; and CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
VOLUME III, PAGES 470-705

DONN P. PICKETT*
DANIEL M. WALL
ALFRED C. PFEIFFER, JR.
HOLLY A. HOUSE
MCCUTCHEN, DOYLE,
BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California
94111
Telephone: (415) 393-2000
Counsel for Petitioner

JONATHAN W. ROMEYN
EASTMAN KODAK COMPANY
343 State Street
Rochester, New York 14650
Telephone: (716) 724-4578
Of Counsel

JAMES A. HENNEFER*
LAW OFFICES OF
JAMES A. HENNEFER
425 California Street
19th Floor
San Francisco, California
94104
Telephone: (415) 421-6100
Counsel for Respondents

*Counsel of Record

Petition For Certiorari Filed December 20, 1990
Certiorari Granted June 17, 1991

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LAW OFFICES OF JAMES A HENNEFER
James A. Hennefer, Esq.
220 Sansome Street, Fourteenth Floor
San Francisco, California 94014
(415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICE,)
INC., et al.,)
)
Plaintiffs,)
)
vs.)
)
EASTMAN KODAK COMPANY,)
)
Defendants.)

NO. C 87 1686
WWS

**DECLARATION
OF KIM
TAMVAKAKIS
IN OPPOSITION
TO
DEFENDANT'S
MOTION FOR
SUMMARY
JUDGMENT**

I, KIM TAMVACAKIS, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge, except as so stated, and I could competently testify to them if called upon to testify.

Background

2. I am President of Atlanta General Microfilm Company, Incorporated, d/b/a Datek, Ltd. This company was originally started as a Kodak dealer in the late 1950's, selling Kodagraph brand microfilm equipment.

3. Atlanta General's business involves servicing, reconditioning, sales of equipment and supplies, brokering, and microfilming, solely in the area of micrographics.

4. Atlanta General employs a number of top technicians, qualified in micrographics and photocopy maintenance. Charles Cochran is a veteran of 30 years with the Eastman Kodak Company, with 22 years in micrographics equipment service and 8 years in photocopy repair service.

5. Our technicians, and Atlanta General spend considerable time and moneys through technical manuals, through training by other technicians, and, where available, through training by the companies which manufactured the machines.

6. Additionally, we order, and have always ordered and stocked well in advance, for our needs, the Kodak micrographics, and other micrographics parts which we use. Since Kodak's "parts action" in 1986, however, Kodak will greatly delay large orders for our inventory, although they have professed that they want us to stock inventories for our own needs.

7. Atlanta General Microfilm is involved primarily with Kodak micrographics equipment, but handles Minolta, Canon, Microsize and Microdesign machines and service as well.

Discrimination In The Application of Kodak's Micrographics Parts Policy

8. Immediately after the change in Kodak's micrographics parts policy announced in July 1986, Kodak

began instituting a number of policies which discriminated against Atlanta General, but favored companies that did not compete with Kodak directly in the micrographics service and used equipment area, or, companies who had substantial other business with Kodak.

9. The following discrimination has occurred:

9.1. On parallel orders, for the same micrographics parts from Kodak Parts Services, Atlanta General as a "BENU" (competitor) was told that the part was an "all time" part which could not be purchased from Kodak at all. At the same time, the same part was ordered by a non-BENU (non-competitor) and the part was immediately shipped by Kodak and received by the non-competitor. Attached hereto as *Exhibit A* are the identical orders, and Kodak's discriminatory response. This has occurred on several occasions.

9.2. Parts have been ordered by Atlanta General as a "BENU" (competitor) and Kodak has stated that these parts are "back-ordered" or will be delayed for some reason. The same order, placed through a non-BENU (non-competitor) has been shipped immediately by Kodak to the non-competitor. For example, our order no. 99B2792 was delayed by Kodak and took 41 days to arrive at Atlanta General on a non-rush basis. The same part, ordered the same day by another Georgia-based company on a non-rush basis was delivered by Kodak in two days.

9.3. Through the placement of over a dozen parallel orders, the pattern has remained exactly the same: delays or refusal to sell the parts to Atlanta General, who is a competitor of Kodak, but prompt delivery

to those who have not been blacklisted as Kodak competitors. Immediately after the July 18 announcement by Kodak of its replacement parts policy, "blacklisted" account delays ran approximately 41 days. The average time for Atlanta General to receive orders after they were "blacklisted" was 27 days. The average time for parallel orders put in on the same day, with the same parts order, and on the same non-rush basis was three days.

9.4. Kodak has eliminated the 10% discount for non-rush orders as to Atlanta General. Yet, for parties or companies not identified as Kodak competitors, and not self-servicers, or distinguished from Atlanta General except for their not competing head-to-head with Kodak in the service of micrographic machines or the used micrographics equipment business, the 10% discount is uniformly available. Parties from whom Kodak receives substantial dollar volume of business as film resellers or equipment resellers have, likewise, not been discriminated against in micrographics parts because of Kodak's financial interest in them. AMS, of Monroe, North Carolina, who has three locations as a Kodak reseller, in: Monroe, North Carolina; Jacksonville, Florida; and Daphne, Alabama, has not experienced the discrimination that Atlanta General Microfilm has because it is a substantial Kodak reseller. These resellers, however, will not supply parts to blacklisted ISOs, at least not with Kodak's knowledge. The same is true of service bureaus like Dataplex of Flora, Mississippi.

9.5. Micrographics replacement parts orders are being delayed now, as a result of Kodak's claiming they must be reviewed by "parts specialists." These have resulted in delays of up to six weeks on many parts

ordered by Atlanta General. Parts order by other entities, including parts ordered in the name of my dog, "Remy Corgi" have not experienced these delays, have been processed with a 10% discount for non-rush orders, and have not been refused because they were "all time" parts orders.

Refusal to Deal By Kodak Parts Suppliers

10. In an attempt to alleviate the parts problems created by Kodak's refusals to sell to Atlanta General Microfilm, I contacted Bodine Electric, a supplier of motors for Kodak micrographics equipment. Bodine Electric refused to sell me, on any terms and conditions, the high speed motor for a Kodak Prostar DVR processor. I am unable to obtain this part except through Kodak.

Atlanta General's Competition With Kodak

11. Atlanta General competes directly with the Eastman Kodak Company for the service of Kodak micrographics equipment in the area of service and maintenance of such equipment, and for the business of prospective owners of micrographics equipment who have chosen Kodak equipment through the sale of used and reconditioned micrographics equipment.

12. In the area of micrographics repair and maintenance, Atlanta General's prices are substantially lower than those of Kodak. For example, Atlanta General's service call for a simple malfunction taking approximately 15 minutes for a technician to locate the repair would be \$45 (\$15 for one-quarter hour plus a \$30 call charge).

Kodak's same charge for the repair would be \$175. Our service is on a greatly expedited basis for the outlying communities of Atlanta, and many customers have chosen us over Kodak on this basis. The price of our reconditioned equipment, for a Kodak Starvue reader-printer completely reconditioned with lens and console would be approximately \$2,000. Kodak now sells its Starvue reader-printers, new for \$6,509.

13. As a result of Kodak's restriction and discrimination in the sale of micrographics parts, Atlanta General has closed its branch office in Knoxville, Tennessee. In this area, there is no longer a micrographics independent service organization which can compete with Kodak for the service of Kodak micrographics equipment, nor a reconditioner who can offer reconditioned machines. The loss of volume from the branch office in Knoxville, Tennessee is approximately \$100,000 per year.

14. Additionally, because of Kodak's replacement parts practices in the area of photocopy machines, Atlanta General has not gone into this business. This is so, even in light of the fact that Charles Cochran, with 8 years servicing experience in Kodak Ektaprint photocopy machines and training from Kodak, would be fully capable of allowing Atlanta General Microfilm to go into such business, and it is an area in which we could very favorably compete with Kodak.

15. Pat Kelly, who operated American Microfilm out of Mobile, Alabama, has gone out of business as a result of the increased pressures of Kodak for micrographics replacement parts.

16. I have been informed by Financial Suppliers, Inc. of Duluth, Georgia that they will no longer purchase Kodak equipment from our firm for resale and service by us because of our inability to get micrographics parts on an expedited basis. This is a loss of approximately \$100,000 worth of Kodak business per year. The letter received from J. Richard Thompson, Chairman of the Board of Financial Suppliers, Inc. stating this is attached hereto as **Exhibit B**.

Competition For Independent Service of Other Micrographics Equipment

17. Financial Suppliers, Inc. of Duluth, Georgia, changed their purchase of equipment to Fuji. Fuji, as well as Minolta, Cannon, Microsize, Microdesign and certain other manufacturers allows free and open competition for the service of their equipment by independent service organizations. Micrographics equipment parts, manuals, training and necessary equipment for the repair of these manufacturers' micrographics equipment can be purchased by any independent service organizations for the servicing of this equipment, as a result, is at a much lower cost and higher quality than is the case where a manufacturer, such as Bell & Howell, provides only factory service or a single designated dealer for repair service in a territory.

18. The high cost of Kodak EMA's on micrographics equipment have allowed Atlanta General to acquire maintenance of such equipment in direct competition with Kodak on many of our existing accounts.

19. Butler Business Systems was a service bureau in Atlanta, Georgia, that owned a substantial amount of Kodak equipment and had never attempted to service any one else's equipment. It chose to have AGMC and other organizations service its machines, and purchased parts for AGMC to repair these machines. As a result, Kodak sent a letter in the spring of 1987 informing Butler it would not be under the same parts restrictions as independent service organizations. A copy of this letter is attached hereto as **Exhibit C**. This difficulty in obtaining parts and subsequent down time on cameras caused Butler extra expense for overtime and delays in satisfying delivery schedules. Tim Mordarski, President of Butler, was forced to close his business and cited Kodak's parts restrictions as a major contributing factor.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 29th day of January, 1988, at Atlanta Georgia.

/s/ Kim Tamvacakis
Kim Tamvacakis



REMITTANCE INVOICE

EASTMAN KODAK COMPANY

PARTS SERVICES

800 LEE ROAD | ROCHESTER, N.Y. 1

BILL TO

SHIP TO

ATL GEN MICROFILM CO INC

ATLANTA GEN MICROFILM CO

3060 PHARR COURT

3060 PHARR CT.

ATLANTA

GA 30305

ATLANTA

GA 30305

U P S

478

D.U.N.S. NO. 00-220
E.I.N. NO. 16-0417

INVOICE DATE	INVOICE NO.	PS NO.	ORDER RCVD. DATE	DEALER NO.	CUST. ORDER NO.
02-28-87	099319411		02-23-87	6966527	56138

QUANTITY / PART NUMBER

BY UNIT PRICE + AMT.

1 697452	ROLLER-DOC FEED	BACK ORDERED
THIS PART HAS BEEN ORDERED FROM OUR SUPPLIERS ON AN "ALL TIME" ORDER BASIS. IT IS AVAILABLE TO KODAK PERSONNEL AND CUSTOMERS WHO HAVE PURCHASED EQUIPMENT DIRECTLY FROM KODAK AND WHO DO THEIR OWN SERVICE.		
1 697456	ROLLER DISCHARGE	BACK ORDERED
THIS PART HAS BEEN ORDERED FROM OUR SUPPLIERS ON AN "ALL TIME" ORDER BASIS. IT IS AVAILABLE TO KODAK PERSONNEL AND CUSTOMERS WHO HAVE PURCHASED EQUIPMENT DIRECTLY FROM KODAK AND WHO DO THEIR OWN SERVICE.		

MAIL TO:

18

EXHIBIT A 01

PLEASE REFER TO TERMS OF SALE SHOWN
ON REVERSE SIDE OF THIS FORM* BACK ORDERED ITEMS
WILL BE SHIPPED
TO YOU AS SOON
AS AVAILABLE.

SUB TOTAL

SALES / USE

TAX CODE

TRANSPORTATION

TOTAL 5



REMITTANCE INVOICE

STMAN KODAK COMPANY

PARTS SERVICES

800 LEE ROAD

ROCHESTER, N.Y. 14650

CALL TO

SHIP TO

• AAA-MICRO INC.

• AAA-MICK INC.

ATTN-REMY

ATTN-REMY

1795 RIVERSIDE ROAD

1795 RIVERSIDE ROAD

773v.50x

3A 30076

ROSS, T.

GA 30076

479

525

D.U.N.S. NO. 00-220-618
E.I.N. NO. 16-0417150

INVOICE DATE	INVOICE NO.	PS NO.	ORDER RCVD. DATE	DEALER NO.	CUST. ORDER NO.	PAGE
03-07-87	121352	0849656	03-05-87	0025505	5712A	

QUANTITY	PART NUMBER	UNIT PRICE	AMOUNT

1	897452	ROLLER-DOC FEED	BACK ORDER	106 00	106 00
1	897456	ROLLER DISCHARGE	T	106 00	106 00
E-LESS 10% FOR ELIGIBLE NON-RUSH ORDER			SUB TOTAL	106 00	106 00
			PARTS	10 60	10 60
			SUB TOTAL	95 40	95 40

MAIL TO:

3

EXHIBIT A 02_EURGIA E. LOCAL TAX 5%

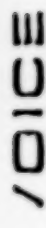
$$T = TAX(E)$$

PLEASE REFER TO TERMS OF SALE SHOWN
ON REVERSE SIDE OF THIS FORM

*** BACK ORDERED ITEMS
WILL BE SHIPPED
TO YOU AS SOON
AS AVAILABLE**

TOTAL	\$	102	12
-------	----	-----	----

BEST AVAILABLE COPY



ROCHESTER, N.Y. 14650

SHIP TO

• AAA-MICRO INC.
--ATTN--REMY
1795 RIVERSIDE R

• AAA-MICRO INC.
ATTN-REMY
1795 RIVERSIDE ROAD

GA 30076

PARCEL POST

480

D.U.N.S. NO. 00-220-6183
E.I.N. NO. 16-0417150

DATE	INVOICE NO.	PS NO.	ORDER RC'D. DATE	DEALER NO.	CUST. ORDER NO.	PAGE
18-87	124787		03-17-87	0025585	5712A	1
<div> <div>QUANTITY</div> <div>PART NUMBER</div> </div>						
1	897452		RCLLER-DOC FEED		T	40 00
BACK ORDER RELEASED						
<div> <div>STOCK</div> <div>5020</div> </div>						
E-LESS 10% FOR ELIGIBLE NON-RUSH ORDER						40 00
SUB TOTAL						4 00
TOTAL PARTS						36 00

MAIL TO:

GEORGIA & LOCAL TAX 58

EXHIBIT A 03

卷一

PLEASE REFER TO TERMS OF SALE SHOWN
ON REVERSE SIDE OF THIS FORM

* BACK ORDERED ITEMS
WILL BE SHIPPED
TO YOU AS SOON
AS AVAILABLE.

Purchase Order

NO 05827

DATEK LTD. - ATLANTA MICROFILM

3040 PHARR COURT

ATLANTA, GEORGIA 30305

(404) 262-2135

Kodak

T O Most of this order was shipped to BUTLER (see below)
ordered on 4/2/87

S H 3 inconsequential items were ordered via
I P our blacklisted A.G.M.C. account (see below)
T O on 4/2/87

ITEM	QTY	DATE REQUIRED	SHIP VIA	POB POINT	TERMS
897452 FEEDER ROLLER	10	700"	Non rush		
189885 WASHER	10				
086892 WASHER	20				
187895 WASHER	20				
164430 WASHER	20				
614964 SEPARATING ROLLER	20				
897600 WASHER	20				

Purchase Order

NO 05818

DATEK LTD. - ATLANTA MICROFILM

3040 PHARR COURT

ATLANTA, GEORGIA 30305

(404) 262-2135

Kodak

T O AAA (716) 724 7278
Hospital ? 3/27/87 control # 896 475
A.G.M.C. 3/31/87 # 901 272
3/31/87 Jay #

Datch

S H I P T
Dennis:
A few of the parts were called in on our
a/c # 6966527 the rest go to AAA and
Hospital Micro. None of the items going to
the blacklisted AGMIC account were on b/o

ITEM	QTY	DATE REQUIRED	SHIP VIA	POB POINT	TERMS
232156 85777Z	10	3/26/87	Non-Rush		
873089	1		ASAP		
121177	5				
876056	1				
873054	18				
873118	2				
151790	5				
873091	10				

EXHIBIT A 04 TOTAL

EXHIBIT B

FINANCIAL SUPPLIERS, INC.

P.O. Box 338 • Duluth, Georgia 30136-0338

Phone: 404-476-1566

November 2, 1987

LOGO

Mr. Kim Tamvacakis
Atlanta General Microfilm Co., Inc.
3606 Pharr Court
Atlanta, Georgia 30305

Dear Kim:

It is hard to tell an old friend that you are going to quit doing business with him. As your records will show, during 1984-85-86, we purchased an average of \$100,000.00 worth of Kodak equipment from your firm. These purchases were made with the understanding that you would repair and service the equipment in a timely manner. Starting in 1986-87 period, your service got worse and worse and your reasoning was that you could not get replacement parts for Kodak. Since this type of equipment must be repaired quickly, we had to stop selling equipment serviced by you.

We have since signed an agreement during the early part of 1987 with Fuji to sell and service their equipment.

If you are able to get your parts problems solved and can make timely repairs, we would consider doing business with you again. While you were able to get parts, your service was excellent.

Hope the facts don't hurt too much.

Yours very truly,

/s/ J Richard Thompson
J. Richard Thompson
Chairman of the Board

JRT/jg

EXHIBIT C

Butler Business Systems, Inc.
1440 Chattahoochee Ave., N.W.
Atlanta, Georgia 30318

Telephone (404)
351-2922

April 28, 1987

Dear Kim:

It is with great regret that I have to inform you that Butler Business will be no more. One of the many reasons for this is the Kodak policy for cutting off parts to us.

As you know, a service bureau whose equipment is mostly Kodak cannot survive against its competition who may be able to keep their machines running either because they are not Kodak, or because they are able to get parts.

The latest letter from Kodak informing us that our parts would be delayed 90 or more days was the final straw. It was indeed strange to get such a certified letter since we are *not an independent service* organization. We have never serviced any one else's equipment. In fact, your company

did most of the work on our cameras. Others who have worked on our cameras were James Tittle d/b/a Micro-technical and Gene Stowers d/b/a Microservice.

When your company was cut off by Kodak from obtaining next-day-air parts in September, 1986, we thought that we could circumvent this arbitrary policy by ordering the parts ourselves. During the past 12 months, we have had twelve orders from Kodak. All of these parts were used in our cameras, except for the one set of belts that you purchased from us for use on your own service bureau cameras.

Accordingly, please note that I am selling the assets of the business to Bell & Howell Records Management for what I consider to be below market.

It would not be fair to say that Kodak's new parts policy was the only reason that I closed down Butler Business. It was a major contribution though.

When I purchased Butler Business Systems in November, 1981, it had already logged over 12 years as a successful Remington Rand Microfilm service bureau. We were progressing very well on obtaining new customers and growing beyond startup projections.

[REDACTED]

There are always factors which affect business, but the difficulty in obtaining parts was not planned. The down time on cameras caused us extra expense for overtime and delays in satisfying delivery schedules.

The microfilm service business is a difficult and close margined business. The small service bureaus need all the

support you can offer. They are the backbone of micro-
graphics in the United States.

Sincerely,

/s/ Tom Mordarski
Tom Mordarski

LAW OFFICES OF JAMES A. HENNEFER
James A. Hennefer, Esq.
220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,)	
vs.	)	DECLARATION OF
EASTMAN KODAK	)	KENNETH W. KASTNER
COMPANY,	)	IN OPPOSITION TO
Defendant.	)	DEFENDANT'S MOTION
	)	FOR SUMMARY
	)	JUDGMENT

I, KENNETH W. KASTNER, declare as follows:

1. The facts herein are known to me of my own personal knowledge, except as so stated, and if called to testify I could and would competently testify to these facts.

Background

2. I am the President of AMTech Equipment Maintenance, Inc., which has its principal offices in St. Paul, Minnesota. I was an employee with the Eastman Kodak Company for 15 years, as an equipment service representative specializing in the repair of Kodak micrographics equipment. I left Kodak to enter the independent service business on January 18, 1985.

3. AMTech is engaged in reconditioning and servicing micrographics equipment, specializing primarily in Kodak equipment. We service a broad range of Kodak microfilmers and accessories, processors, readers and reader-printers. Ninety percent of our business is Kodak business.

4. Our clientele include both people in the private and public sectors. In the private sector we service numerous banks and savings and loans, corporations, and service bureaus who microfilm for third parties. In the public sector we service the Internal Revenue Service, the United States Veterans Administration, and county subdivisions of the State of Minnesota, including Hennepin and Ramsey Counties.

Customers Locked In To Kodak

5. In connection with my fourteen years at Kodak, and through my present business of reconditioning, servicing and selling micrographics equipment to customers, I have discussed with these customers their micrographics equipment needs, operations, and economics of purchasing new or additional equipment.

6. With regard to older Kodak equipment, and particularly with regard to the newer Kodak equipment, the special applications, film and coding, and economic factors require Kodak micrographics customers to continue to have and maintain their Kodak equipment. For example, Super Valu Stores, located in Eden Prairie, Minnesota had an old Kodak Miracode system, with two machines to read their relatively old film. Despite the high cost of Kodak service for these machines, Super Valu could not

afford to trade these machines in or replace them with new machines since they were the only machines that could read and retrieve the old film with years of records. AMTech has maintained these machines for Super Valu Stores, even after Kodak had declared the machines obsolete.

7. Super Valu Stores, as well, has two Oracle cameras and five Oracle retrieval devices. They have about eight to ten years of invoices on this film. Because no other machines can serve the function of the Oracles, and it would be impossible from a cost standpoint to redo the eight to ten years of filmed invoices for Super Valu Stores, they are locked in to these Oracle machines. AMTech has provided maintenance for these at a substantially lower price than Kodak was offering for such a service. The Kodak per call on this Oracle equipment would be about \$80 travel time and \$80/hour, with a minimum of one hour, plus parts. Additionally Kodak customers that do not have an EMA service contract must wait eight hours minimum for service whether or not ESR's are available. AMTech services this equipment on a per call basis, with no required wait for \$35 travel time and \$50/hour which is billed to the nearest 1/10 of hour.

8. On more sophisticated equipment, such as the Kodak equipment in place at State Farm Insurance, Blue Cross and Blue Shield of Minnesota, and Burlington Northern Railway, more sophisticated systems involving IMT 250's or 350's, and Reliant 2000 equipment have computer applications and software producing a similar effect to that of the Super Valu Stores' situation that the application's software, and computer output is not readily compatible with other manufacturer's equipment.

These customers are locked in to their Kodak equipment, and Kodak service. AMTech is unable to provide competitive service for these customers because Kodak's new policy of refusing to allow parts for the newer equipment has kept us from competitive bidding on these accounts.

Kodak's Discrimination Against AMTech on Parts

9. As of September 1, 1986 AMTech has been identified as a Kodak service competitor. We have not received the customary 10% discount for non-rush orders. We have been refused emergency overnight service.

10. When an order is placed the Kodak representative, when rush orders are placed, upon asking for AMTech's customer number, has stated "let me get someone to review your order - your order will be reviewed by a parts planner." These orders are usually very substantially delayed. For example, on May 8, 1987 I placed an order for Kodak Part No. 569759 on a rush basis. The order was referred to a parts planner. The order was not received until June 5, 1987 via Airborne Courier. However, on an identical order placed by ABACI, Inc. on May 8, 1987, for the identical part, the order was received from Kodak on the next day, May 9, 1987.

11. A number of companies, who are service bureaus, but who do not compete, as AMTech does, head-to-head with Kodak for contracts in the public sector and in the private sector have received parts from Kodak on Kodak's usual terms without the type of discrimination described above. These companies include ABACI, Inc., National Business Systems, and Innovative Micrographics.

12. Kodak, further, has represented to our customers and potential customers that we would be unable to get parts from Kodak and satisfy our service contracts. This was represented to Harlan Peterson at ABACI, Inc.

13. As to a small number of smaller parts used in the repair and service of Kodak micrographics equipment, AMTech has been able to purchase these from retail sources who acquired them from the manufacturers who manufacture for Kodak. We have experienced that the price at which Kodak Parts Services resells the parts is 50 to 60% higher than even the retail sources from which we obtain our parts. For example, General Electric manufactures a micrographics lamp no. 1152. This is sold to a retail company, Bulb Man. Bulb Man's price on this item was \$2.90. Kodak charged \$6.00 for the same item.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 27 day of January, 1988, at St. Paul, Minnesota.

/s/ Ken Kastner
Ken Kastner

LAW OFFICES OF JAMES A. HENNEFER
 James A. Hennefer, Esq.
 220 Sansome Street, Fourteenth Floor
 San Francisco, California 94014
 (415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,)	
vs.	)	DECLARATION OF
	)	STEPHEN M. SEARLE IN
EASTMAN KODAK	)	OPPOSITION TO
COMPANY,	)	DEFENDANT'S MOTION
Defendant.	)	FOR SUMMARY
	)	JUDGMENT

I, STEVE SEARLE, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge except as so stated, and I could competently testify to them if called upon to testify.

Background

2. I am the President of Searle Enterprises, Inc., d/b/a Micro Image. Our company is located in Spring, Texas and serves the Southern Texas area.

3. We repair and service Kodak Micrographics equipment, including Kodak Reliant 450, 550, 600, 700, 750 and 800 microfilmers, Kodak Oracle microfilmers and retrieval units, Kodak Starvue readers and reader/

printers, Kodak Starfiche reader/printers, Kodak MRGI and MRD2 microfilmers, Versamat processor, Kodak Prostar processors, Kodak RP1 and 2 microfilmers and Kodak Rotoline microfilmers. Approximately 90% of our business is in Kodak equipment. In addition to service and repair, we sell and lease reconditioned Kodak equipment.

4. Our total revenues for the fiscal year ending September 30, 1986 were \$315,759.91. Our revenues from Kodak micrographics machines, which had expanded in every year from 1984 through 1986, did not increase in 1987 because of Kodak's actions.

5. Micro Image began business on August 25, 1984. Prior to starting business we contacted the Eastman Kodak Company Customer Parts Service Department in Rochester, New York and informed them that we were starting up a business as an independent service company specializing in servicing Kodak equipment. We were told that we could order parts from them, and there would be no problem. We were told that we would be able to obtain all parts on either a routine or rush basis. This was confirmed in the replacement parts principles and the terms of sale which Kodak sent us which stated that Kodak would sell micrographics parts to meet "the needs of its equipment owners" and would provide them "to any party who intends to use them to repair Kodak equipment."

6. Our customers are banks, private industry, and some governmental agencies, including Allied Bank, First Bank and Trust, Interfirst Bank, Pennzoil Company, Bechtel, Incorporated, Dow Chemical Company, Mitchell

Energy, Union Texas Petroleum, Mobil Oil, and Harris County Clerk's Office (Houston).

7. On all of these accounts, we have competed directly with Eastman Kodak Company in offering service for micrographics equipment. Our services are offered at substantial discounts below the published prices of the Eastman Kodak Company, and the quality of our service, according to our customers, has been superior to that they receive from Kodak. For example, our prices for an annual maintenance contract on a Kodak Starvue reader/printer, and on Oracle terminals were set at 20% below Kodak's prices in 1984. Since that time, Kodak has had at least two price increases in its annual maintenance contracts, which were not followed by Micro Image. Kodak's prices are now approximately 30-40% higher than ours.

Kodak Replacement Parts Policies and Discrimination Against Micro Image

8. We received a letter from Kodak on August 5, 1986, from Joseph O'Brien, informing us that as of September 1, 1986 Kodak's new replacement parts policies and practices for micrographics equipment would go into effect, and that we would not be able to order parts from them without incurring a waiting period, and that we would no longer be eligible for any discounts. On September 3, 1986, we placed a rush order with Kodak and were informed that it would take up to 90 days to receive this part where as similar orders had been delivered before in one day. On September 5, 1986, I placed a

routine order with Kodak and was informed that it would take 90 days to receive these parts.

9. We maintain a computer printout showing parts ordered by our company from the Eastman Kodak Company from June 25, 1986 through the present. This, together with the invoices we received from Kodak show a number of elements of Kodak's policies designed to put independent Kodak micrographics equipment suppliers out of business. These acts have included the following.

9.1. Kodak has instituted substantial delays on our parts orders whereas non-competitors of Kodak get overnight delivery. Kodak, in this regard, has attempted to cover up the actual delays, by post-dating the invoices to the date of the release and shipping of the order, not the date the customer actually placed the order. This practice has been in place only for all orders since September 1, 1986. The delays in parts and response to routine orders in September 1986 went from a normal response time of 10 days to 39 days.

9.2. Crucial parts were singled out by Kodak, and the delays on the crucial parts increased by Kodak, seemingly without regard to whether those parts were items that were easily ordered and stocked by Kodak. These critical parts are the ones which it is most important for Micro Image to receive on a prompt basis, so that their customers' machines are not out of service.

9.3 Kodak has made statements to a number of our customers, including Craig Wright, of Union Texas Petroleum, about limiting parts to Micro Image. When Craig Wright contacted Kodak about purchasing an Oracle microfilmer and retrieval unit from Kodak he was told

that it would not be wise to buy the older equipment, because the parts would not be available in the future to service it. Kodak tried to sell him a new Reliant 2000 microfilmer unit instead. When Craig Wright asked whether Micro Image would be able to get parts for this machine, she was told that Micro Image could only purchase parts if they had purchased parts from Kodak in the past. But, when she asked if Kodak would put this into writing before she bought the machine, Kodak refused to do so. They would not assure her that Micro Image could purchase parts even if they had purchased them in the past.

10. During this period from September 1986 to the present while Micro-Image, as a competitor of Kodak, had its parts severely limited, my wife's English china shop, The China Hutch, was able to order micrographics parts with any restrictions.

11. The China Hutch had never dealt with Kodak before, had never purchased or owned any micrographics equipment for Kodak, or anyone, and, was not in the business of micrographics.

Customers Lost Due to Kodak's Restrictive Parts Policy

12. Micro Image has lost a number of customers because of their concern with Micro Image's ability to obtain parts, since Kodak's change in micrographics parts practice and policy in September 1986. We have lost the business of Allied Bank of Texas in Houston, Texas since we were unable to obtain the parts from Kodak to service the new Kodak machine that they obtained. Coastal Corporation of Houston, Texas said that they would not take

out a contract with Micro Image, again, because they were concerned that we could not get overnight parts.

13. The volume of business actually lost, and business which we might have obtained, had we been able to assure parts for the service of the Kodak micrographics equipment, would be approximately \$30,000 for business lost, and approximately \$100,000 for business which we might have obtained.

14. In Houston, it was our experience that customers were extremely upset with Kodak service because the technicians from Kodak were unable to service all types of their Kodak micrographics equipment, and they would have to get several different Kodak technicians for different machines. We offered technicians who were proficient in all machines, and could have expanded almost at will, but for parts.

Kodak OEM Parts Sources Not Available

15. In an attempt to obtain parts which Kodak would not sell us, I contacted the Pittman Company in Pennsylvania. We were told that the motors made by this company could not be purchased by anyone else except Kodak since the parts were made specifically for Kodak and they could not sell them to anybody else.

16. I also contacted Guardian Electric Company to obtain parts which we were having difficulty obtaining from Kodak. Guardian Electric, no matter what quantity of parts I ordered, quoted me a price more than double what Kodak's *resale* price to me was.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 30 day of January, 1988, at Spring, Texas.

/s/ S M Searle
STEPHEN M. SEARLE

LAW OFFICES OF JAMES A. HENNEFER
James A. Hennefer, Esq.
220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,)	
vs.	)	DECLARATION OF
EASTMAN KODAK	)	<u>JAMES M. ANDERSON</u>
COMPANY,	)	IN OPPOSITION TO
Defendant.	)	DEFENDANT'S MOTION
	)	FOR SUMMARY
	)	JUDGMENT

I, JAMES M. ANDERSON, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge, except as so stated, and, if called upon to testify to these facts, I could and would competently testify thereto.

Background

2. I am President of Advanced Systems Services, Inc., which is a Colorado corporation having its principal place of business in Denver, Colorado. We have two offices, one in Denver, Colorado, and one in Colorado Springs, Colorado. We have been in business approximately six years and do over \$300,000 in gross annual

volume. We are engaged in the sales and service of micrographic equipment and supplies and over one-third of our business is in Kodak equipment and supplies.

3. Our customers for service include the Federal government, State and city government entities, hospitals, pharmacies, banking institutions, insurance companies, title companies, real estate agencies, law firms and libraries.

4. We service a wide variety of Kodak cameras, processors and reader-printers including the Kodak Reliant 450 through 800, Recordak, Starfile, Starvue, IMT 50 - 450, Prostar I and II, Kodak Versamet and Kodak MRK.

Technicians and Parts

5. The technicians in our independent third-party service center are highly skilled in the service of this equipment. We compete directly with Kodak for our customers, and have bid against Kodak and obtained the following customers: City and County of Denver, State of Colorado, Lowery Air Force Base, Bureau of Reclamation, NOAA, and Bureau of Land Management.

6. Our parts are ordered directly from the Eastman Kodak Company central parts service, and have been ordered as such for the six years that we have done independent service on Kodak micrographics equipment. This was in reliance on Kodak's policy, stated in its parts policy that they would supply parts to all persons for the service of Kodak machines.

Kodak's Restriction on Parts

7. On September 5, 1986, at 8:00 a.m. Denver time, we placed an order to Kodak for certain micrographics parts needed for the independent servicing of Kodak micrographics equipment. These were not "all time" parts but were parts that regularly wear out on Kodak machines. Kodak's agent, Sue Kimmel, took the order and stated that she was willing to ship it rush. Thereafter, upon requesting our dealer number, she referred to a notice, and said that the parts could not be shipped until a later date, and that the rush order would not be honored.

8. When we inquired as to what the problem was, we were told by Ms. Kimmel that someone else would have to call us back within the hour. We waited until 3:00 p.m. Denver time and called Kodak Central Parts Service in Rochester, New York, again being told that someone would call us back immediately.

9. It was not until the following Monday that we received a call from Joseph O'Brien, the author of the July 15, 1986 letter, whose first statement was "Tell me exactly what your company does." Mr. O'Brien was quite rude during the balance of the conversation and kept insisting that he had to know what our company did and that we had received a registered letter regarding the "year old" policy that Kodak had regarding parts shipments. We requested a copy of the signed return receipt for the letter that was sent to us and were told that it could not be located. The address to which Kodak had sent it was the old address from which we had moved some time before and the letter had apparently never reached us.

10. Mr. O'Brien then told us that the parts would not be shipped for 90 days, even though the parts were in stock, but that the order that we placed on the 5th would be shipped in that 90 day period. We returned our call to Ms. Kimmel at Central Parts Service and were told that the order was no longer in effect, that the order would have to be replaced. Kodak assured us that Joseph O'Brien would call me regarding the mixup in the order. No such call was every received. Attached here to as **Exhibit A** is a letter of September 9, 1986 which we received from Joseph O'Brien, confirming our telephone conversation.

Business Foreclosed

11. As a result of Kodak's policy and practice changes in September 1986, Advanced Systems has lost numerous customers, including: Sunstrand Company, who employs Kodak because independent service cannot get service information and parts on newer equipment; and, the Colorado Student Loan Program, Denver, Colorado, to whom Kodak represented that Advanced Systems would be unable to provide service for their machines because of parts. Advanced Systems has been unable to bid for or secure others in competition with Kodak. The volume of such business which was lost as a result of Kodak's parts action would amount to in excess of \$250,000.

12. While Advanced Systems has been unable to get Kodak parts on a reasonable basis, other companies, who did not purchase Kodak machines directly from Kodak have ordered and received parts just as before July 1986.

These companies differ from Advanced Systems only in that they order large amounts of film and supplies from Kodak, and are not in high-profile competition with Kodak in service. These companies include Datafilms, Inc., American MicroData, Datacorp, Dakota Graphics, Quality Records and X-L Micro Systems.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 26 day of January, 1988, at Denver, Colorado.

/s/ James Anderson
James Anderson

EXHIBIT A

[KODAK LOGO]

September 9, 1986

Advanced Systems Services, Inc.
1525 West Bayaud
Denver, CO 80223

Attn: Mrs. Pam Anderson

Dear Mrs. Anderson:

This will acknowledge and respond to our telephone conversation on September 8, 1986.

I regret that there was a delay in your receiving my letter on Kodak's parts practice. However, that delay does not affect the substance of our current business practice which has been in the process of implementation for more than a year.

I have included as an attachment another copy of the letter.

Sincerely,

/s/ Joseph M. O'Brien
Joseph M. O'Brien
Business Imaging Systems

JMO/bjb

LAW OFFICES OF JAMES A. HENNEFER
James A. Hennefer, Esq.
220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
)	
Plaintiffs,)	
	)	DECLARATION OF
vs.	)	MICHAEL ARNOLD IN
	)	OPPOSITION TO
EASTMAN KODAK	)	DEFENDANT'S MOTION
COMPANY,	)	FOR SUMMARY
	)	JUDGMENT
Defendant.)	
)	

I, MICHAEL ARNOLD, declare as follows:

1. The facts herein are known to me of my own personal knowledge, except as so stated, and if called to testify I could and would competently testify to these facts.

Background

2. I am the president of CPO, Limited, a California corporation engaged in the business of servicing and repairing Kodak photocopy machines, reconditioning used Kodak photocopy machines, and selling used Kodak photocopy machines. I also sell used Xerox and IBM copiers and duplicators.

3. I have been engaged in the used Kodak copier industry, first with one of the founding companies of the industry, Equipment Brokers Unlimited, and then with my own company, CPO, Limited since 1984.

4. Through the purchase and sale of machines from all sources, including individual auctions, liquidations, leasing companies, corporations, governmental entities, I have become familiar with the market values of used Kodak, Xerox and IBM machines.

Competition With Kodak - Used Machines

5. In purchasing used machines for reconditioning or resale, CPO Limited competes directly with the Eastman Kodak Company who buys such machines or takes them as trade-ins on new machines. Attached hereto as **Exhibit A** are true copies of the Kodak trade-in schedules for July 1986 and January 1987 for the trade in of Kodak copier-duplicators to Kodak copier-duplicators. Attached hereto as **Exhibit B** are true copies of the Xerox Trade-In Allowance Schedule for July 1986, and for December 1986 for used Xerox copier-duplicator products being traded in for new Xerox copier-duplicator products.

The Used Machine Market

6. These schedules show, for the trade in of comparable machines that, the older a Xerox machine model became, generally, the less the machine was worth in trade. The same is not true for Kodak machines. For example, on the trade in of comparable models of Xerox, a Model 1075 for a Model 1090, the trade in price during

this period dropped from \$18,000 to \$13,000. With Kodak, for comparable models, a 150 traded in for a 250, the trade in price for this period rose from \$10,000 to \$18,000.

7. During this period, the used value of a Kodak Ektaprint 150 has dropped from \$10,000 down to a range of approximately \$2,500 - \$3,500. So, for a machine that is worth approximately \$2,500 on the used market, in January 1987, Kodak was paying \$18,000.

8. A precipitous drop in the value of used Kodak machines in the 1986-1987 period has been caused by: 1) Kodak's refusal to sell replacement parts to third-party service organizations, the vigorous enforcement of that practice, attempts to cut off all supplies of parts; and, 2) Kodak's arbitrary practices with regard to the acceptance of Ektaprint machines for Kodak service, including arbitrary and unreasonable inspection and certification fees, unwarranted reconditioning fees and requirements, and arbitrary refusal to do anything at all with broken equipment.

Kodak's Anticompetitive Actions

9. For example, Tim Koester, who is the District Service Manager for San Jose, has, for some time, up until 1987 inspected used machines, and, within reasonable limits, put machines on Kodak equipment service agreements after they were reconditioned. This was due to the fact that our equipment service representative, John Elle, had 23 years experience as a Kodak equipment service representative, and is one of the best in the business. Machines reconditioned by John Elle are, from our experience, among the best reconditioned machines in the

country, including those reconditioned by Kodak's own reconditioning centers. In 1987, however, after John Elle had reconditioned a Kodak 85, a Kodak equipment service representative went through the reconditioned machine and stated that it would cost approximately \$6,000 to bring the machine up to standard. Among the items cited was the requirement for a new photocopying drum. This drum was had earlier been tested with Kodak testing apparatus, and exceeded all of Kodak's specifications and standards for an existing drum, and, in fact, did not need replacement.

10. When I questioned Tim Koester about the radical change in Kodak's policy, I was told words to the effect that "I'm under pressures now that I wasn't under before."

11. Additionally, with regard to Kodak authorized parts, packed, shipped and sold by Kodak to entities from whom CPO acquired them, Kodak has now refused to allow any of these parts to be installed on Kodak's machines. We have been told by the Kodak service representatives and Tim Koester words to the effect that the origin of the parts is questionable so they cannot be put in a Kodak machine. This was said despite the fact that the parts were clearly wrapped, labeled and marked as genuine Kodak parts which had not been opened or taken out of their original wrappings.

12. Kodak, in July 1985 instituted a "pre-installation inspection fee," and a requirement that machines be reconditioned prior to being put on a Kodak Equipment Maintenance Agreement ("EMA"). This policy, and the requirement that these machines be reconditioned, while

impeding the sale of used Kodak equipment, and lowering its value slightly, did not account for the precipitous drop in the value of used Kodak equipment which has occurred in 1986 and 1987.

13. However, through a series of steps, Kodak has increasingly tightened or made impossible the pre-installation inspection/reconditioning/parts requirements which have had the effect of making our business more and more difficult to operate. These steps are set out below.

14. The "pre-installation inspection fee," which was required by Kodak before any used equipment (even if Kodak had serviced it for its entire life) could be serviced by Kodak, was raised precipitously in January, 1987. For example, the cost of the pre-installation inspection fee for a 150 copier/duplicator went from \$250 (which was supposed to, and does cover the cost to Kodak of this inspection) to \$1,500.

15. Thereafter, Kodak closed down reconditioning shops, including the reconditioning shop in Whittier, California (which was moved to Mexico), leaving no reconditioning shops I am aware of except the one located in Rochester, New York.

16. As the price of used Kodak copier/duplicator machines became lower and lower, so that used equipment brokers could buy the machines and still pay a remanufacturing fee (with transportation) of \$7,500 or larger, Kodak added language that "remanufacturing for equipment not purchased directly from Kodak is available at the sole discretion of Kodak." (Exhibit C, p. 20)

17. This language is now being used by Kodak to refuse to remanufacture machines, so that, despite the low price of used equipment, Kodak can still refuse altogether, and without any basis, to remanufacture a machine or service it.

18. In one instance of which I am aware, on one brokered Kodak 250AF for which service was applied from Kodak, Kodak first said that it could go on service if it were reconditioned (even though the machine was only about four years old and had been totally maintained by Kodak), then when Kodak was told to go ahead and recondition it and put it on service, Kodak refused to do so, based on the recent policy change.

19. Further, although one may buy a Kodak reconditioned machine (sold by Kodak for the new machine price), with a guarantee of service from Kodak for seven years plus an additional seven years with a yearly inspection, brokers are discriminated against where the *same* remanufactured machine, also remanufactured by Kodak, is being sold by them. In the case of brokers like CPO there is no seven year guaranteed service, with an additional seven years on a yearly inspection for machines, although remanufactured by Kodak, if that machine was not purchased *directly from Kodak*, but was purchased from an equipment broker - even though Kodak did the remanufacturing of that machine.

Kodak "Security" Agents

20. Kodak has applied pressures, through its "security agents," to prevent the flow of copier parts to companies like CPO. In November 1987, Mr. William

Kennedy came to my offices in San Jose and introduced himself as a "security agent from Kodak." He demanded that I produce for him records on a Kodak 85 copy machine. This machine had been purchased by Shawn Repco of Excel, Inc., from the Xerox Corporation, who acquired it as a trade in on a Xerox machine. I purchased this machine from Mr. Repco and resold it to the Copy Shoppe in Whittier, California. The Kodak security agent, nevertheless, implied that the machine was stolen. The machine had been delivered and put into service with the Copy Shoppe in June 1987. After the call by the Kodak "security agent," and although Kodak had serviced this machine for six months on a "per call" basis with only two service calls, Kodak called the Copy Shoppe in Whittier, California and demanded that they pay for an Equipment Maintenance Agreement, in arrears, for the six month period between June 1987 and December 1987.

Supply of Used Machines

21. Kodak has further attempted to "gather up" and keep off the market used copier machines by a number of practices. United States Leasing Company and Citicorp Leasing used to be able to sell machines into the used market after their leases expired. Kodak has now required them to give Kodak a first right of refusal to repurchase those machines when they come off the lease. That right of first refusal, if not exercised by Kodak, allows the leasing company to sell the machines on the open market. However, with the depressed used Kodak copier equipment prices on the open market, the leasing companies we have dealt with have had little choice but to resell to Kodak, or trade in these machines. Kodak

either reconditions these machines (often selling them as new machines), or scraps them.

22. Kodak has bid against used equipment brokers, and thereafter scrapped numerous machines that came onto the open market. After the end of a lease of approximately 40 Kodak machines the RCA Corporation wanted to sell these machines. In particular, 33 150P Ektaprint copiers were purchased, after Kodak bid thousands of dollars above the market price for each copier. I am informed that these copiers were not reconditioned, but were junked to keep them off the used copier market.

23. The direct effect on our business of Kodak's parts, inspection, reconditioning, service and used equipment policies has been to dry up the sale market for used equipment, to those few entities still left who can find parts and independent service for the machines, or who can obtain parts themselves and service the machines themselves. Despite the fact that the Kodak Ektaprint copier machine population has greatly increased over the past two years, the supply of used Ektaprint copiers has decreased due to Kodak's policies.

Kodak's Statements Regarding CPO's Service And Parts

24. Kodak representatives have repeatedly engaged in misinformation regarding CPO, its parts and service, to try to dissuade our customers from purchasing CPO's brokered Kodak's Ektaprint equipment or service for that equipment. The following incidents have occurred or been reported by CPO representatives.

25. In July 1986 a Kodak representative stated to Mary Evans of Drexler Technology that CPO's equipment could only be antiquated, with no update or retrofit possible and was probably a lemon. They said that CPO, Ltd. could not provide any parts or support for the equipment. All of these statements were untrue.

26. In August 1986, Kodak told Jim Hill of San Jose State University that they would not service any equipment which was purchased from CPO, Ltd. They later changed this and said it would be very expensive to put under service, even though the unit had been under full Kodak service prior to that time. After San Jose State University cut the purchase order to CPO, Ltd. Kodak said they would have matched CPO, Ltd.'s price, even though after one and a half years of marketing this account they have never offered a unit at this same price.

27. In August 1986, Kodak told Coleen Burke of San Jose University that they would match any bid submitted by CPO, Ltd. - even though Kodak cannot do this, since it is under a GSA contract with the university and must submit GSA pricing only.

28. In December 1986 Kodak represented to Trude Cevallos of Systems Industries that Systems, which rented two Kodak 150F's, was locked in to its contract with Kodak, and that CPO's machines were lemons and she would be unable to get parts or service for these machines. Ms. Cevallos was upset and wrote to Kodak complaining about the rude and unethical behavior of the Kodak representatives.

29. In January, 1987 Kodak representatives told Sandy Chiarzvalle of Berlinger, Cohen & Biagini that

even if Kodak were to service brokered Ektaprint copiers, the service would be more expensive than if the machine were purchased from Kodak. Kodak also, contrary to its stated policy said that they would refuse to provide training with service contracts if the equipment were brokered. They said that any unit sold by CPO was probably a lemon.

30. In October, 1986 Kodak was bidding against Pan American World Airways for the sale of copiers to Pan American. Kodak's pricing was \$7,000 higher per machine than CPO's. Kodak reduced their bid, after being given an opportunity by Pan American, to \$2,000 higher than CPO's. After Pan American cut the purchase order to CPO, Ltd., Kodak stated that our equipment was unreliable equipment and that Pan Am was taking a high risk - even though the equipment was currently covered under a Kodak Equipment Maintenance Agreement. Kodak charged Pan American double for each machine for the free installation kits, and engaged in a series of delays in inspecting and providing maintenance for these machines.

Other Pressures on CPO Customers

31. CPO bid against Kodak for the supplying of five Ektaprint machines to Photo-Drive-Up copy shops. CPO's prices for these machines were lower than Kodak's for comparable machines. Photo Drive Up had already been qualified by Citicorp to finance the purchase of these Ektaprint machines. However, when Photo Drive Up chose CPO as their vendor, after initially agreeing to complete the financing, Citicorp, through pressure from

Kodak, refused to do so because of their pre-existing relationship with Kodak.

Kodak's Maintenance Costs Are Higher Than In the Xerox Competitive Market

32. Whereas Kodak has a virtual monopoly on the service of Ektaprint copiers, there being fewer than ten servicers in the whole country, there is fierce competition from ISOs for Xerox copier service, since parts are available to all servicers for Xerox machines. Attached hereto as **Exhibit C** is a copy of the February 1, 1987 Kodak Ektaprint Copy Products Price Schedule. Under this schedule, the yearly maintenance for a 150AF Ektaprint copiers for Kodak Service would be \$28,968 (based on 100,000 copies). The same service for a comparable Xerox 1075 is about \$9,800.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 24th day of January, 1988, at San Francisco, California.

/s/ Michael Arnold
Michael Arnold

* * *

[Exhibits A, B and C to Declaration of Michael Arnold are lodged separately with the Clerk.]

LAW OFFICES OF JAMES A. HENNEFER
 James A. Hennefer, Esq.
 220 Sansome Street, Fourteenth Floor
 San Francisco, California 94104
 (415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,)	
vs.	)	DECLARATION OF
	)	RONALD M. VARING
EASTMAN KODAK	)	IN OPPOSITION TO
COMPANY,	)	DEFENDANT'S MOTION
	)	FOR SUMMARY
Defendant.	)	JUDGMENT

I, RONALD M. VARING, declare as follows:

1. The facts stated herein are known to me of my own personal knowledge, except as so stated, and if called to testify, I could and would competently testify thereto.

Background

2. I am the owner of International Business Equipment, a business involved in the brokering and servicing of high speed duplicators. IBE is located in Santa Fe Springs, California. We provide sales and service for Kodak Ektaprint Models 100, 150, 200, 225, and 250. We provide sales and service, as well, for the Xerox 9000 series, 1075, 1090 and 8200, as well as the IBM III 60.

3. Our primary customers are large users of Kodak machines including copying shops, quick print shops, and major accounts.

4. I have engaged in the purchase and sale of used photocopy equipment from all sources, including individual auctions, liquidations, leasing companies, corporations, and governmental entities since 1986. I began service of Kodak Ektaprint copiers in 1986. I am aware of only three other servicers of KODAK Ektaprint copiers in the United States. I am familiar with the market values of used Kodak, Xerox and IBM machines, and the service markets for these machines.

Kodak's Attempts To Eliminate Service And Brokering of Ektaprint Machines

5. Prior to the implementation of Kodak's recent practices on Ektaprint photocopy machines, including refusal to sell parts to independent service organizations, stopping of all parts sources, increasing the cost of Kodak service for used machines, and making reconditioning difficult or impossible, Kodak had stated to me that this process was underway and the purpose of this process - to put us out of the used Kodak Ektaprint machine business.

6. In October 1986 at the Graphic Expo East in Philadelphia, Pennsylvania, I spoke with Mitchell J. Bender, from the Copy Products Division of Kodak. Mr. Bender was the Manager of the commercial print market, which handled sales of Kodak Ektaprint copiers to the copy shop market - who are large buyers of such equipment

from Kodak. Mr. Bendar stated that the brokers, including IBE were doing way too much business, and that it affected his bottom line. He said that Kodak would be taking action to put us out of the Kodak business.

7. Subsequently, at the Graphics of America exhibit in Miami, Florida in January 1987, Mr. Bendar again stated words to the effect that "I told you not to mess with us," that "what Kodak is doing is lighter than I wanted," and "don't mess with us, sell used Xerox machines."

8. Kodak's steps to cut off parts for Kodak machines have included strongarm tactics by Kodak's "security" forces. I had been purchasing Kodak parts from a company in Chicago, the James Jones Company. This company had come to my attention as a result of an advertisement I ran for Kodak Ektaprint copier service in the Los Angeles area in a publication called "Quick Print."

9. The James Jones Company represented that they had a stock of parts for servicing Kodak Ektaprint copiers in the Chicago area. They were closing down their business, but had a stock of parts available for sale, and could buy and order parts from the Eastman Kodak Company. I purchased orders of parts from James Jones Company which I asked Capital Leasing of Chicago to take delivery on and trans-ship to me, since James Jones did not want to pay for shipping out of the Chicago area, but wanted the parts C.O.D. Chicago.

10. On Friday, December 11, 1987, I received a call from the President of Capital Leasing of Chicago. A "William Kennedy" representing himself to be from

Kodak's "security" forces in Rochester was at Capital Leasing's offices. I spoke with Mr. Kennedy on the telephone. He stated that he was investigating the movement of stolen Kodak parts through Capital Leasing. He said that the parts were "unauthorized" and that Capital Leasing was guilty of "receiving and transporting stolen parts." He further stated that the FBI would be involved. He demanded to know the persons I was buying the parts from and obtain copies of the checks for those parts. Mr. Kennedy, without any legal process or authorization, confiscated eight boxes of Kodak Ektaprint parts. Kodak has made no response or explanation of this incident, although I have inquired, through my counsel, as to their authority for the confiscation of these parts. I have had no contact from the FBI.

11. Mr. Kennedy demanded that I disclose all information concerning my purchases to him and provide him with the paperwork and copies of checks for the parts. He stated that he would be coming to California to collect these. Mr. Kennedy never came. All of the parts in question were paid for in full, at a fair market value for the parts. I have no reason to believe that these parts were "stolen," and no proof has been provided me.

12. Kodak's institution of the new policies on pre-installation inspection fees have greatly impeded the ability of brokers to sell used Kodak Ektaprint equipment, and greatly reduced the value of this equipment.

13. Kodak's sales people and service people have told me that their instructions from Rochester are to charge as high a price as possible for inspection fees and

for reconditioning as a means of squeezing out used equipment brokers for Ektaprint equipment.

14. The initial cost of a pre-installation inspection fee, for example, for a 150 copier/duplicator was initially set at \$250. This amount was easily sufficient to cover the cost to Kodak for the time and materials of this inspection. The raising of the fee to \$1,500 as of February 1, 1987 was what Mr. Bender referred to in January 1987 through his warning "not to mess with us."

15. In closing down its Ektaprint reconditioning center in Whittier, Kodak took direct steps to prevent me from acquiring their service technicians to assist in servicing and reconditioning Kodak Ektaprint copiers. Employees from the Whittier reconditioning plant who interviewed with me before the closing were threatened by Kodak with immediate firing, or the withholding of medical benefits. Ron DeMarco, a Kodak personnel agent, admitted that he had called IBE pretending to be from Citicorp, to determine if Kodak's personnel were considering working for IBE.

Competition Between IBE And Kodak

16. In purchasing used machines for reconditioning or resale, and in servicing machines, IBE competes directly with the Eastman Kodak Company. IBE is virtually the only servicer in the United States, except for Northern and Southern California, who buys such machines or takes machines as trade in on new machines. Kodak, as the prices on the open market for used Kodak Ektaprint copiers have dropped, has anomalously, raised its trade-in prices. This is not the case with Xerox and

IBM machines. The market value of Kodak Ektaprint copiers over the past two years, as a result of Kodak's actions, have dropped to less than one-fifth of their prior value, for comparable machines of comparable age.

17. This drop in used price for Kodak Ektaprint copiers, combined with Kodak's high trade in value for Ektaprint copiers if traded in on new Kodak equipment, has made used photocopy machines extremely scarce in the marketplace. Kodak Ektaprint copy machine owners, despite the high cost of Kodak service, are retaining their machines.

18. Also, as the price of Kodak used machines has dropped, Kodak has instituted a series of steps, in addition to the pre-installation inspection fee, making it more and more difficult to acquire service on a brokered copier. The closing down of the reconditioning centers around the country has greatly increased the cost of reconditioning. Kodak has now even stated that it will recondition machines only at its "discretion." Under this policy, Kodak has refused to recondition machines, even where these machines have been under Kodak maintenance for their entire life.

19. Whether with the pre-installation inspection fee, or reconditioning policies, if a machine is brokered, Kodak has been discriminating against this machine and making it as expensive as possible to get on to Kodak service, or refusing to do it at all.

20. As a result of Kodak's policies, Kodak Ektaprint copier machine owners are locked in to Kodak's machines, unless they wish to take a substantial capital loss on those machines. This is shown by the fact that the

used Kodak machine market has dried up, despite the fact that there are more and more Kodak Ektaprint machines in use than ever before. IBE has, as a result, seen an increasing loss of sales through the inability to purchase used machines (which are simply not on the market); and the inability to obtain reconditioning and service for brokered machines, (or the high cost of doing so). IBE's Kodak Ektaprint used machine business has decreased in revenues from approximately \$600,000 in 1986 to approximately \$100,000 in 1987.

21. The Kodak used copier market is in stark contrast to the IBM and Xerox markets. While the Kodak market has undergone substantial changes in the past two years, no such changes have occurred in the used markets for IBM and Xerox. IBM and Xerox allow for independent service of their photocopy machines, and for the purchase of parts by independent copy repair services. The IBM and Xerox photocopy repair markets have been very competitive as to price and quality, which the Kodak market has not been, because of Kodak's restrictive parts/servicing/reconditioning policies.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 26th day of January, 1988, at Santa Fe Springs, California.

/s/ Ron Varing
Ron Varing

LAW OFFICES OF JAMES A. HENNEFER
James A. Hennefer, Esq.
220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6900

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
)	
Plaintiffs,	)	DECLARATION OF
	)	<u>JAMES A. HENNEFER</u>
vs.	)	IN OPPOSITION TO
EASTMAN KODAK	)	DEFENDANT'S MOTION
COMPANY,	)	FOR SUMMARY
	)	JUDGMENT
Defendant.)	
)	

I, JAMES A. HENNEFER, declare as follows:

1. I am familiar with the facts herein of my own personal knowledge, except as stated, and if sworn could competently testify thereto.

2. I am an attorney licensed to practice law before all courts of the states of California and New York and before the Federal District Court for the Northern District of California, Southern District of New York, the Ninth Circuit Court of Appeals and the Second Circuit Court of Appeals.

3. I have been engaged for fourteen years in representation of clients in the area of antitrust and unfair competition matters in the federal and state courts. I am counsel for the plaintiffs herein.

4. Attached hereto as **Exhibit A** is a true and correct copy of the United States Department of Justice "Merger Guidelines", dated June 14, 1984.

5. This action was filed on April 14, 1987. Plaintiffs are 18 business located throughout the United States. Plaintiffs engaged, in part, in the service and repair of Kodak micrographics equipment and Kodak Ektamate photocopiers. These companies are mostly small business organizations, and are located in 10 states including California, Colorado, Georgia, Illinois, Minnesota, Missouri, New Jersey, New York, Pennsylvania and Texas.

6. Plaintiffs are loosely organized in an organization called MESDA ("Micrographics Equipment and Service Dealers Association"). The association, immediately after the filing of the complaint, during the summery of 1987 was engaged in organization, funding, the processing additional members of that service Kodak equipment who wished to have their claims heard in this action. Discovery was not initiated immediately, pending the admission of additional MESDA members and amendment of the Complaint to include their claims.

7. A verbal request was made of counsel for defendant Kodak as to whether plaintiffs would be allowed to be added to an amended complaint without need for a motion on or about September 1, 1987.

8. Prior to plaintiffs initiating discovery in this action, on August 14, 1987, defendant Kodak brought this motion for summary judgment, based upon facts that Kodak states "are as the Complaint describes them" (with relatively minor corrections).

9. Plaintiffs, as set court in their Memorandum of Points and Authorities and declarations, disagree that the policies of Kodak and their intent was not anticompetitive, and that their effects did not injure consumers of plaintiffs' services, and plaintiffs themselves.

10. At the first status conference in this case, held on September 11, 1986, the Court continued defendant's motion for summary judgment to allow plaintiffs to conduct the following discovery: 1) One set of interrogatories (with a suggested limit of 25 interrogatories); 2) one set of request for production of documents (with a suggested limit of 25 requests); and, 3) four depositions of persons with knowledge pertaining to summary judgment issues. Except for leave of Court, the plaintiffs were not allowed to take additional discovery. This order regarding discovery was filed September 18, 1987.

11. Plaintiffs elected, because of the limited number of depositions allowed, to take depositions of Kodak employees with knowledge in the areas of the declarations filed in support of the summary judgment motions. Plaintiffs expressed, verbally, and in writing, that depositions of additional Kodak personnel, and customers in the marketplace might be necessary to the defense of the summary judgment if declarations could not be obtained from these people.

12. On December 9, 10 and 11, 1987 the depositions of Emmett A. Gross, Edward Ince, and Lynn Brockmann Gleason, Kodak employees, were taken in Rochester, New York, and were allotted one day each. In two of these depositions, those of Mr. Gross and Ms. Gleason, the witnesses repeatedly required questions to be reread, and did not understand many of the issues and subject matters covered. Examples are set out in Exhibit G and I hereto.

13. On December 21, 1987, after counsel for plaintiffs and defendant were unable to reach agreement as to further discovery, including additional depositions, additional requests for production of documents, and a motion to compel documents in eight areas as to which documents had been refused to be produced by Kodak altogether, a status conference was held with the Court by telephone at defendant's request.

14. In this status conference, plaintiffs' counsel requested the right to bring a motion for leave of the court to pursue further discovery, and to compel responses to requests for production of documents. The Court stated that it would not entertain such a motion. Attached hereto as **Exhibit B** is the request for the Court to include this ruling in its order.

15. The Court, in response to plaintiffs' request for additional depositions ruled that "no more than two additional deponents" could be deposed, which deponents were required to "provide testimony regarding the issue of market power raised in defendant's motion for summary judgment." The Court further ruled, that any additional discovery should be addressed pursuant to

Rule 56(f) of the Federal Rules of Civil Procedure. The Court's order was filed January 4, 1988.

16. On January 11, and January 12, 1988, the depositions of John A. Lacy and Jeffrey L. Bradley, Kodak employees were taken at Rochester, New York. Mr. Bradley, upon deposition, had limited knowledge with regard to many issues and subject areas required for defense of the summary judgment motion. Examples are set out in Exhibit K hereto.

17. This case, as set out in Plaintiffs' Memorandum of Points and Authorities, covers a two very broad markets with very complex interrelationships between plaintiffs, defendant, third-party alleged co-conspirators and customers. It is nationwide in scope, and covers a multitude of products in a number of product groups, including, new and used Kodak Ektaprint copiers, new and used Kodak micrographics equipment, Kodak replacement parts for micrographics and Ektaprint photocopy equipment, and Kodak and independent service for Kodak micrographics and Ektaprint copiers.

18. Plaintiffs, as a result of the limited discovery allowed by the Court, have been unable to address, except through declarations of themselves and other ISOs, many of the important issues in the marketplace with regard to: 1) relevant market; 2) market power; and 3) competitive injury.

19. Because of the economic pressure Kodak exerts in the marketplace, particularly with regard to customers who are or may become dependent on Kodak's service, persons who could not be deposed, because of the limited scope of depositions allowed by the Court, were reticent

to or refused to discuss the case with plaintiffs' counsel, or, after discussing it, would not sign declarations which they acknowledged to plaintiffs were accurate. Attached here to as **Exhibit C**, and **Exhibit D** are drafts of such declarations of Paul Gilbertson and Frances Hurley, which they declined to sign for these reasons.

20. Additionally, and for the same reasons, some of the statements set out in the declarations opposing this motion for summary judgment by the declarants are not on personal knowledge, but, if depositions were allowed beyond the five authorized by the Court, could be established on the personal knowledge of deponents.

21. On each of the factual issues raised in the Memorandum of Points and Authorities, specifically set out in the Memorandum of Points and Authorities at the "INTRODUCTION" Sections I A through E, II A through B; and in the "STATEMENT OF FACTS at IA thorough C, IIA and through C, and, IIIA through C, plaintiffs, if given the opportunity to continue discovery, could establish through further depositions of Kodak personnel, requests for production of subpoenas of outside parties and their documents, each of the facts stated therein. With the limited scope of discovery allowed, and the complex realities of the marketplace, it has not been possible to do so.

22. Plaintiffs' request, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, that they be given the opportunity to obtain such further discovery. The relevance of these issues, pursuant to the Court's order of

January 4, 1988, is stated in detail in Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion For Summary Judgment.

23. On June 3, 1985, I attended the deposition of J. Raymond Sutcliffe. Mr. Sutcliffe was duly sworn by the Court Reporter and asked questions and answered those questions. Attached hereto as **Exhibit E** are true and correct copies of excerpts from a certified copy of Mr. Sutcliffe's deposition transcript.

24. On June 3, 1985, I attended the deposition of John A. Lacey. Mr. Lacey was sworn by the Court Reporter, and was asked questions and answered those questions. Attached hereto as **Exhibit F** is a true and correct copy of the excerpts from a certified copy of Mr. Lacey's deposition transcript.

25. On December 8, 1987 I attended the deposition of Emmett A. Gross. Mr. Gross was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit G** is a true and correct copy of excerpts from a certified copy of Mr. Gross' deposition transcript.

26. On December 9, 1987, I attended the deposition of Edward V. Ince. Mr. Ince was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit H** is a true and correct copy of the excerpts from a certified copy of Mr. Ince's deposition transcript.

27. On December 10, 1987, I attended the deposition of Lynn M. Gleason. Ms. Gleason was duly sworn by the Court Reporter, was asked questions and answered those

questions. Attached hereto as **Exhibit I** is a true and correct copy of excerpts from a certified copy of Ms. Gleason's deposition transcript.

28. On January 11, 1988, I attended the deposition of John A. Lacy. Mr. Lacy was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit J** is a true and correct copy of excerpts from a certified copy of Mr. Lacy's deposition transcript.

29. On January 12, 1988, I attended the deposition of Jeffrey L. Bradley. Mr. Bradley was duly sworn by the Court Reporter, was asked questions and answered those questions. Attached hereto as **Exhibit K** is a true and correct copy of excerpts from a certified copy of Mr. Bradley's deposition transcript.

30. Attached hereto as **Exhibit L** are documents produced by the Eastman Kodak Company, from the business records of the Eastman Kodak Company, kept in the ordinary course of business, bearing numbers inscribed by them for purposes of the document production, and produced to plaintiffs in response to Plaintiffs' First Request For Production of Documents filed with the Court on September 28, 1987.

31. I have caused to be reviewed the documents produced by the Eastman Kodak Company as documents numbers 2375 through 2902, a "Listing of Items Purchased for CESD in the Last 18 Months" together with related documents, and it appears that approximately 90% of such parts are purchased from outside sources and not internally produced by Kodak.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30 day of January, 1988, at San Francisco, California.

/s/ James A. Hennefer

JAMES A. HENNEFER

EXHIBIT B

LAW OFFICES OF

JAMES A. HENNEFER

220 SANSOME STREET

FOURTEENTH FLOOR

SAN FRANCISCO, CALIFORNIA 94104

(415) 421-6100

December 30, 1987

HAND-DELIVERED

Alfred C. Pfeiffer, Jr., Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, California 94111

Re: *Image Technical Services, Inc., et al. v. Eastman Kodak Co.*, United States District Court, Northern District of California Action No. C 87-1686
WWS
Our File No. 1001.01

Deal Al:

We are in receipt of your letter of December 29, 1987 and the amended and proposed order memorializing the

December 21, 1987 telephone conference before Judge Schwarzer in the above-noted case.

With regard to paragraph number 3 of the proposed order, your understanding is correct, that the identification of the source, author and date of documents, where ascertainable, will only be with regard to a discrete number of documents specifically identified by plaintiffs, and not to identification of all documents *en masse*.

With regard to our proposed paragraph number 4 for the order, we do not agree that it is 'an inappropriate addition to the order.' I specifically requested permission of the Court to file a motion and to brief the issues of additional discovery and of compelling further responses to discovery already initiated. The Court ruled that such a motion should not be filed, but that the matters which might be contained in the proposed motion should be handled pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. I do not disagree that paragraph 5 addresses a portion of the Court's ruling, but believe the order to be incomplete with regard to the Court's ruling on the motion for discovery.

To assure that my conduct is not construed as a waiver, I must decline to agree to your proposed form of order as amended and must submit the enclosed form of order which more completely and accurately reflects the rulings of Judge Schwarzer on December 21, 1987 by adding the proposed paragraph number 4. The enclosed order, except for paragraph 4, is identical to the form of order attached to your letter of December 29, 1987.

I would request that both orders be submitted to Judge Schwarzer together with the copy of this letter which is enclosed.

Sincerely,

/s/ James A. Hennefer
James A. Hennefer

JAH:er
Enclosure

cc: Hon. William W. Schwarzer

EXHIBIT B

LAW OFFICES OF JAMES A. HENNEFER
James A. Hennefer, Esq.
220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,)	
Plaintiffs,	)	NO. C 87 1686 WWS
vs.	)	ORDER
EASTMAN KODAK	)	(PROPOSED)
COMPANY,)	
Defendant.)	

A conference was held in this matter by telephone on December 21, 1987 at 3:30 p.m., at which time counsel for

the parties were heard regarding possible further discovery necessary for the plaintiffs to respond to defendant Eastman Kodak Company's pending motion for summary judgment. Having heard the arguments of the parties and good cause appearing therefor, the Court hereby ORDERS:

1. The revised briefing schedule on defendant's motion for summary judgment shall be as follows:

a. Plaintiffs shall file their response to defendant's motion on or before January 29, 1988;

b. Defendant shall file its reply brief on or before February 12, 1988;

c. The hearing will take place on February 26, 1988, at 11:00 a.m.

2. Without altering the above-described briefing schedule, plaintiffs shall be given the opportunity to take the depositions of no more than two additional deponents who can provide testimony regarding the issue of market power raised in defendant's motion for summary judgment.

3. Without altering the above-described briefing schedule, defendant will, upon specific requests by plaintiffs, provide plaintiffs with the source, author and/or date, if ascertainable, of any documents already produced to plaintiffs by defendants.

4. The Court will not entertain any motion by plaintiffs to compel discovery already noticed or for further discovery prior to their response to defendant's motion for summary judgment.

5. In connection with their response to defendant's motion for summary judgment, plaintiffs may move this Court, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for the opportunity to obtain further discovery relevant to the issues raised by and material to defendant's summary judgment motion. Any request for additional discovery should be accompanied by an explanation of the relevance of the requested information to the issues raised by the material to defendant's motion for summary judgment.

IT IS SO ORDERED.

Dated:

WILLIAM W. SCHWARZER
Judge, United States District Court

Approved as to form:

For Plaintiffs:

LAW OFFICES OF JAMES A. HENNEFER
JAMES A. HENNEFER
220 Sansome Street, Fourteenth Floor
San Francisco, California 94104
(415) 421-6100

By: /s/ James A. Hennefer
James A. Hennefer

McCUTCHEN, DOYLE, BROWN & ENERSEN
DONN P. PICKETT
DANIEL M. WALL
ALFRED C. PFEIFFER, JR.
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

By: _____
Daniel M. Wall

EXHIBIT C

LAW OFFICES OF JAMES A. HENNEFER
 James A. Hennefer, Esq.
 220 Sansome Street, Fourteenth Floor
 San Francisco, California 94104
 (415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,)	
vs.	)	DECLARATION OF
	)	PAUL GILBERTSON IN
EASTMAN KODAK	)	OPPOSITION TO
COMPANY,	)	DEFENDANT'S MOTION
Defendant.	)	FOR SUMMARY
	)	JUDGMENT

I, PAUL GILBERTSON, declare as follows:

1. I am Director of Computer Science Corporation in Sacramento, California.

2. Computer Science Corporation is in the business of claims processing for health and dental benefits for governmental entities. We have contracts with the State of California, State of Washington, and State of Colorado to process health and dental benefits administered by the State.

3. In connection with our processing of claims, we use record keeping devices which include a combination

of micrographics machines and computer output hardware and software tailored to our needs.

4. Our equipment includes the following Kodak equipment: 98 IMT 150 Microimage terminals; two Prostar processors, two Starfische reader-printers and two 750 intelligent control microfilm units.

5. The Eastman Kodak Company serviced all of our micrographics equipment up until March 1986.

6. CSC decided to move away from Kodak services because of the prices being offered by ITS were much more attractive, and because ITS agreed to provide more expeditious services, including having an in-house service representative.

7. In 1986 when ITS competed directly with Kodak for our maintenance contracts, Kodak was charging us over \$200,000 per annum for the maintenance. ITS made a proposal to us to service the same contract for approximately \$150,000. Kodak then lowered its price to approximately \$150,000 per annum, and ITS lowered its price to approximately \$120,000. After more negotiation, Kodak lowered its price to approximately \$135,000, and ITS bid, and received the contract for maintaining all of our Kodak equipment for just over \$100,000 per annum.

8. Without ITS as an independent micrographics service organization, CSC would have paid over \$200,000 to Kodak for the servicing of our micrographic equipment. Moreover, Kodak demanded that payment for its service contracts be made up front, and ITS agreed to allow quarterly payments for the yearly maintenance contract.

9. ITS service has offered a quality of service and response time far superior to that of the Kodak service. ITS put an in-house service representative at CSC, and the response time and service on our equipment has improved substantially. ITS has an extra machine to replace machines that are down at CSC, or to take assemblies out and replace those assemblies in our units to assure that the machines can be back in service quickly.

10. When the ITS contract for maintenance of our machines began, we had three micrographics machines that had not been working for six months under Kodak maintenance and service. The ITS representative found the problems and had these machines operating in approximately two weeks.

11. CSC, because of the combination of machines, software used, and applications for that software, and the capital invested in our machines and in the training of our employees, could not possibly switch from Kodak machines to another brand. We are totally dependent upon the Kodak machines, because the replacement of the special applications which we have prevents us, as a practical matter, and as a financial matter, from switching to any other variety of micrographics machines.

12. Without ITS, and independent third-party service, even if Kodak were to charge \$200,000 or 10 or 20 percent above that, we would be forced to pay the price for the maintenance of its equipment, because we cannot switch to another manufacturer's equipment.

13. In 1987, I went to the Eastman Kodak Company in Rochester, New York, for an introduction of new products. At a break in one of the meetings, in the hallway, outside the meeting, three or four Kodak personnel,

including Jack Lacy, were talking in the hall. I was asked why CSC went to third-party services. I told him that it was a matter of lower price, and better service from ITS than I was able to get from Kodak. I was told by Jack Lacy words to the effect that it "doesn't make any difference because we're going to have third-party service by the balls because of the replacement parts." The Kodak people in that conversation clearly stated that Kodak would be putting the independent service organizations out of the business of repairing micrographics equipment.

14. As a result of this, I returned to Sacramento and expressed my concern to ITS as to whether they would have any problems getting parts. This was of substantial concern to me because of the critical nature of our receiving continued service for our machines.

15. Because Kodak has control of the replacement parts for micrographic machines, and because of the possible problems with third-party service, ITS has to provide a price substantially lower than that of Kodak in order to be attractive to CSC in repairing its machines.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ____ day of January, 1988, at Sacramento, California.

/s/ _____
PAUL GILBERTSON

EXHIBIT D

LAW OFFICES OF JAMES A. HENNEFER
 James A. Hennefer, Esq.
 220 Sansome Street, Fourteenth Floor
 San Francisco, California 94104
 (415) 421-6100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICE, INC., et al.,	)	NO. C 87 1686 WWS
Plaintiffs,)	
vs.	)	DECLARATION OF
	)	FRANCES HURLEY IN
EASTMAN KODAK	)	OPPOSITION TO
COMPANY,	)	DEFENDANT'S MOTION
	)	FOR SUMMARY
Defendant.	)	JUDGMENT
)	

I, FRANCES HURLEY, declare as follows:

1. I have acted as the Purchasing Agent for Commercial Trust Company, a bank with 27 branches throughout the State of New Jersey, with its principal offices located at 15 Exchange Place, Jersey City, New Jersey.

2. I acted as Purchasing Agent for Commercial Trust Company for ___ years, from _____ to _____. In such capacity, I had direct responsibility for the purchasing of goods, supplies, equipment and equipment service for the headquarters and various branches of Commercial Trust Company. In such capacity, I dealt directly with

representatives of major equipment manufacturers, supply manufacturers, distributors, and independent organizations supplying equipment service.

3. As the Purchasing Agent for Commercial Trust Company, it was my responsibility to obtain the highest quality equipment and service for that equipment at the most competitive prices.

4. To assist in the records keeping, Commercial Trust Company employees a micrographic system, micro-filming records, processing that microfilm, and retrieving it with reader-printers. For the purpose of retrieving the information, Commercial Trust Company has 30 Recordaks, one in each of its 27 branches, and three in different departments in the principal office in Jersey City, New Jersey.

5. These Recordak machines represented a large capital investment. To change them would be a major expense. There would also be difficulties in changing the machines, because there are different microfilm formats, different operator requirements, and replacement of these machines with other brands might create problems in obtaining the service from a single source.

6. Commercial Trust Company employed the service of the Eastman Kodak Company through its equipment service representatives for the 30 Kodak Recordak machines until 1981.

7. J-E-S-P, a company with its principal offices in East Brunswick, New Jersey bid on our service contract in 1982. We switched from Kodak to J-E-S-P in 1982 and cut our maintenance costs for the Kodak Recordak machines

in half. J-E-S-P Company has provided Commercial Trust with excellent service from 1982 through the present on all of the Kodak Recordak machines.

8. Because it was critical to Commercial Trust that the Kodak Recordak micrographic retrieval machines in each of the 27 branches and three departments of Commercial Trust operate at all times, it required that the service be prompt, and that there be as little down time as possible.

9. Had J-E-S-P been unable to provide parts and service on a timely basis because of an inability to get parts from the Eastman Kodak Company in a timely fashion, Commercial would have had to cancel the J-E-S-P contract and had to obtain service from Eastman Kodak Company directly. (This would be even more true were J-E-S-P to have been unable to get parts at all from Kodak.) The service of Commercial's Recordak machines would have been required even if the costs of such service were substantially higher than J.E.S.P.'s costs or Kodak's former costs, because of the importance of keeping these machines in operation, and the costs and difficulty in changing machines.

10. Commercial Trust Company considered the purchase of new reader-printer machines to replace the Kodak Recordak machines in 1986. The purchase of new Kodak machines will received special consideration because of the Kodak name, the compatibility of the microfilm with Kodak reader-printers, the familiarity of the operators with Kodak equipment, the availability of service, and the position Kodak occupies in the micrographics field.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ____ day of January, 1988, at Jersey City, New Jersey.

FRANCES HURLEY

EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

_____x	:	
FAR WEST	:	
MICROGRAPHIX, INC.,	:	CIV. S-83-
	:	371MLS
Plaintiff,	:	
- against -	:	
EASTMAN KODAK COMPANY,	:	
Defendant.	:	
_____x	:	

CONFIDENTIAL

Pursuant to Protective Order

DEPOSITION UPON ORAL EXAMINATION OF:
J. Raymond Sutcliffe

LOCATION:	Rochester Plaza, Suite 553 Rochester, New York 14614
DATE:	June 3, 1985
TIME:	1:04 p.m.

REPORTED BY: MARIA A. WOLCZYK, C.S.R., R.P.R.
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 25] J. RAYMOND SUTCLIFFE - DX BY MR. HENNEFER

A. It was brought to my attention that 3M paper was being used in our Reader-Printers, and there was some discussion about the fit of that product in our equipment and its performance.

Q. Let me ask you a few background questions here.

A. Yes.

Q. How do you interface, how does the BIS interface with the Service Division?

A. CESD?

Q. Yes.

A. Well, it is a separate division of the company, responsible to service and maintain the equipment sold by and manufactured by Eastman Kodak Company for all divisions of the company.

Q. Yes.

A. And as one of the divisions, as soon as its equipment is sold, they are responsible for servicing and maintaining that equipment on our behalf.

Q. When a new line of equipment came out, for example, when the Kodak Reader-Printer in the series of

the - the Starvue, Oracle, IMT came out, did you develop or did CESD develop a new group of [p. 26] technical people for that specific purpose, for servicing those?

A. No, not as such.

Q. What occurred?

A. They would train many of their present service people who maintain the micrographic, the microfilmers and other associated products on the new IMT Reader-Printers and may well have added to the number of service representatives, based on our projected sales of that equipment to the customers.

Q. BSMD and BIS then interfaced with CESD -

A. Yes.

Q. - in planning the product?

A. Yes.

Q. In planning the service; is that correct?

A. Yes.

Q. And the overall marketing -

A. No.

Q. They didn't, okay. Marketing strategy?

A. No.

MR. PICKETT: Let's have better questions. The question "marketing strategy," I object to the form of that.

MR. HENNEFER: Okay.

[p. 27] Q. Let me ask you this. In the Reader-Printer field, CESD had contracts after the warranty on your

products, service contracts, maintenance contracts after the warranty on your product wore out, is that correct, or expired?

A. Expired, yes.

Q. And -

THE WITNESS: May I object to his term in use of "wore out"?

MR. PICKETT: Absolutely.

MR. HENNEFER: It's inspired as the ultimate wearing out, I guess, ceased to exist.

Q. In 1977, approximately what percentage of the Kodak machines were handled by Kodak service people and CESD, in the Reader-Printer area I'm talking about specifically?

A. Rephrase the question again, please.

Q. What percentage of the machines, of the micrographics machines, Reader-Printers, were handled by CESD Kodak service warranties, service contracts after the warranties wore out in 1977?

A. Oh, I would estimate that somewhere between 75 and 80 percent of the customers would exercise the option to place the Reader-Printers [p. 28] under an equipment performance plan.

Q. With Kodak?

A. With Kodak, yes.

Q. And those that did not, who would service those machines?

A. Either the customer or presumably Kodak on a per call basis.

Q. And what additional percentage would Kodak handle on a per call basis of those machines, is what I'm asking you?

A. The balance.

Q. Pretty much the balance?

A. Yes, as far as I know.

Q. What you are saying is very few customers service their own machines?

A. Yes.

Q. So Kodak, through CESD, serviced approximately 100 percent of their own machines?

A. In 1979 through 1982.

Q. They did?

A. Yes.

Q. When did you first become aware of Far West as a plaintiff in this lawsuit?

MR. ROMEYN: As plaintiff?

* * *

EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FAR WEST MICROGRAPHIX, INC., Plaintiff, - against - EASTMAN KODAK COMPANY, Defendant.	CIV. S-83- 371MLS
--	----------------------

CONFIDENTIAL

Pursuant to Protective Order

DEPOSITION UPON ORAL EXAMINATION OF:
John A. Lacy

LOCATION: Rochester Plaza, Suite 553
Rochester, New York 14614

DATE: June 3, 1985

TIME: 10:03 a.m.

REPORTED BY: MARIA A. WOLCZYK, C.S.R., R.P.R.
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 58] JOHN A. LACY - DX BY MR. HENNEFER
difference in terms of the insensitivity.

MR. HENNEFER: Historical. I'm not asking this year.

MR. PICKETT: Okay, fine.

A. I don't remember the specific numbers for each year.

Q. Was it based on total sales?

A. That's one measure that we look at.

Q. Okay. What are other measures that you look at?

A. Absolute dollars, targets can be an absolute specific dollar amount.

Q. Yes.

A. And then it's up to us to develop the programs to meet those goals.

Q. Are you familiar with the term "manufacturing margin"?

A. Yes.

Q. What does that mean?

A. That would be the difference between the cost to produce the product and the selling price.

Q. Does BIS expenses and profit have to come out of that margin?

A. Yes.

[p. 59] Q. Does it come from anywhere else?

A. What do you mean?

Q. Are there other sources of that profit? You don't have any other sources of profit, or do you?

A. I'm not sure I understand the question. Profit only comes from the products we sell, if that's your question.

Q. Products and services? And services are gauged in the same way, are they?

A. Generally.

Q. Cost of services sold?

A. Yes.

Q. If you will?

A. Yes.

Q. And versus selling price?

A. Yes.

Q. Okay. And the Service Division is part of BIS; is that right?

A. No, it's not, it's a separate division.

Q. Separate division?

A. Yes.

Q. And the name of that division is?

A. CESD, Customer Equipment Service Division.

[p. 60] Q. And how do you allocate services you receive from other divisions, or assistance you receive from other divisions?

MR. PICKETT: For what purposes?

MR. HENNEFER: For purposes of profitability in BIS.

A. The Service Division, I assume, develops their own system. I'm not familiar with how they do that specifically.

Q. Market Intelligence is a subdivision of BIS?

A. That's correct.

Q. And all of the support that you get you get internally from BIS, you don't get outside support from other divisions?

A. I don't understand the question.

Q. For which you are charged?

A. Oh. Might other divisions give support for which there is a bill-back?

Q. Yes.

A. I guess that's true.

Q. What other divisions would those be?

A. Specific chargebacks. Well, any, if we contracted for any specific services. But generally

* * *

[p. 80] A. Some I would, yes.

Q. What about forecasting, did you receive the reports from Forecasting?

A. Yes.

Q. How about product program reports?

A. Well, again, many of them. I don't know that I got all of them.

Q. Are you familiar with how the machine warranties and service contracts work in a general way?

A. In a general way, yes.

Q. Okay. And how do those work?

A. Well, the warranty is a specified period of time after installation during which we pay the costs of service. After that, the customer has an option of a service agreement or to pay on service on a per call basis.

Q. What are the time periods on those?

A. Oh, normally product equipment warranty is 90 days, but that has varied over the years.

Q. And when a machine is sold, what percentage of those machines after the warranty runs out take a service contract?

MR. PICKETT: Reader-Printers or -

[p. 81] MR. HENNEFER: I'm just talking Reader-Printers, yes.

A. I don't know the specific Reader-Printer number.

Q. Do you have any idea what range it's in?

A. Well, in general, it's over 80 percent for all our products, so I assume Reader-Printers would fall into that range.

Q. Has that been the same from 1977 through 1984?

A. In a broad range, yes.

Q. Would it have increased or decreased during that period? Is there a larger independent service organization now than there was earlier?

A. I don't think there has been a significant change one way or the other.

Q. So in the Reader-Printer market, somewhere in the range of over 80 percent would take a service contract from Kodak?

A. I assume that's true.

Q. In the sales area of BIS, did you gauge paper sales against machine sales, write the two of them?

A. I don't understand the question.

EXHIBIT G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

-----x
IMAGE TECHNICAL SERVICES,
INC., et al.,

Plaintiffs,

- against -

EASTMAN KODAK COMPANY,
Defendant.
-----x

No.
C871686
WWS

DEPOSITION UPON ORAL EXAMINATION OF:

Emmett A. Gross

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: December 8, 1987

TIME: 9:45 a.m.

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 32] accounting value.

Q. Is the price set on that part if it's used under an EMA the same as the price that is charged to a customer on a per call basis for that part?

A. Is the price set to whom?

Q. The price set to CESD.

MR. WALL: By whom?

MR. HENNEFER: By the parts center.

A. CES -

MR. WALL: Let me just tell you one thing, so we can move on. The CESD Parts Services is, as I understand it, a part of CESD. So you are assuming a sale to CESD. CESD does procure parts but it will procure them

either from parts manufacturers or KAD or some other entity. That might help you in framing the question.

Q. Is that correct, sir, what he's just described?

A. That's right. Parts Services, which is a part of CESD, buys from you know . . .

Q. The manufacturers?

A. All vendors, whether those are internal or external to the company. So the part is [p. 33] there. It's within that - when I said purchase, we purchase that general service from them.

Q. With regard to micrographics parts and photocopy parts, are the prices set on those the same whether they are used on a per call basis or whether they are sold to a third party?

MR. WALL: Which prices?

A. That was my question before. I am sorry, but you haven't explained to whom. If you are talking to the -

Q. The price that is charged to the equipment owner?

A. All right.

Q. Or the purchaser of that part, the third-party purchaser of that part. Is there a difference in the price that is charged on a per call basis to the equipment owner and the price that is charged to a third party who buys a micrographics or photocopy part?

A. We sell - we have a price list on all of those parts, and that price list is for anyone who purchases parts from us.

Q. Whether it's on a per call basis in connection with service from CESD or whether it's [p. 34] a third party; is that correct?

A. We would sell the part at the same - generally at the same price.

Q. When you say generally at the same price are there exceptions?

A. Well, I think we do give in micrographics a discount or a change depending on the speed with which they want it delivered. I mean emergency orders.

Q. Cost more?

A. I am not completely familiar with Parts Services, but there is a general policy there that would have a difference, list price as published.

Q. You generally described to us the replacement parts policy on photocopy equipment, and the review of the policy in April, 1985, with regard to micrographics replacement parts. You are familiar with those; is that correct?

A. I am familiar with the 1985 review of micrographics.

Q. Can you tell me why the two policies at this time differed, that is between photocopy equipment and micrographics equipment replacement [p. 35] parts?

A. You are talking in 1985?

Q. Right.

A. At the time -

Q. the review took place resulting in your joint letter of April, 1985.

A. I don't think we generally had much of a policy in the BIS area in terms of, you know, complete policy at that time. We had a policy where we were selling parts at that time to people, and Copy Products we did not have that, our policy was not to sell parts.

Q. Do you know why it developed that way?

MR. WALL: Why which policy developed which way? It's a compound question, that's the problem with it.

Q. Why it developed that there was a dichotomy between the two?

MR. WALL: Well, I object to the question in that I don't think that there's a foundation that the witness has an understanding of why the Copy Products policy developed the way it did, and without that foundation he cannot explain the dichotomy.

* * *

[p. 41] out of that.

Q. Was there any discussion at the same time about the volume of sales, whether that should be increased or decreased at CES Parts Center?

A. I don't think we had any discussions or hardly any discussions relative to sales. We knew what they were.

Q. During the 1985 through 1987 period, has the inventory level of CES Parts Center been reduced?

A. Since 19 -

Q. '85, yes.

A. I'm not familiar with where their inventory is at the current time. I am sorry, but I'm not involved in that business. I think we did.

Q. Okay.

A. I think we did make some improvements in that asset.

Q. Okay. Do you recall what the amount of those improvements on a percentage basis was?

A. No.

Q. Okay. When you say in paragraph 6 of [p. 42] your Declaration that everyone agreed that \$16 million of micrographics equipment parts in stock was too high, how was it established that this was too high?

A. I'm not sure if we had a specific methodology to determine that. I think it was just felt that that was a lot of money tied up in inventory.

Q. What other parts are sold from the CES Service Center besides micrographics parts and photocopy parts?

A. From our Parts Services?

Q. Yes.

A. They generally sell parts on all products.

Q. Every piece of equipment or product made by Kodak?

A. I think so, yes.

Q. Okay.

A. Generally, they are a parts center, so for customers they are the ones handling those parts for everyone, where we make them available.

Q. Are you familiar with what the total volume of parts sold out of CES Parts Center is?

[p. 43] A. No, I'm not familiar.

Q. Were there reviews by other divisions, that is other than the micrographics, the BISD Division, about the parts inventory at CES Parts Center?

A. There's a general review of that asset on an ongoing basis. It's an important part of the business, so that there's a continuous look at that.

Q. And was it specifically looked at with regard to other areas besides the micrographics parts in or about 1985?

MR. WALL: If you know.

A. I'm not positive what all the reviews were.

Q. Do you recall whether there was a review of any other inventories besides the micrographics inventory at CESD Parts Center?

A. I think there's generally a review of that asset, as any cost element, it's an ongoing part of business.

Q. What I'm asking you specifically is if you know of any other specific division's parts besides BISD's that were reviewed in 1985?

[p. 44] A. No.

MR. WALL: I'll object to the question, no foundation the witness would have knowledge of that.

Q. What?

A. The answer is no.

MR. HENNEFER: It's not a foundation. He either has knowledge or he doesn't.

MR. WALL: Just so it's clear, there's no reason to believe that he would know about such a thing.

MR. HENNEFER: There is. In fact, it says, "At that time there was a growing recognition throughout the entire company that we needed to improve management of our physical assets." But . . .

Q. What knowledge did you have, if any, that service organizations were actively attempting to take away the - independent service organizations were actively attempting to take away revenues from Kodak?

MR. ROMEYN: Paragraph 7.

MR. WALL: You are referring to paragraph 7 of the Declaration?

[p. 45] MR. HENNEFER: That's correct.

MR. WALL: Do you want to take a moment to review that?

THE WITNESS: Could I please?

MR. HENNEFER: Sure.

(There was a pause in the proceeding.)

A. Could you repeat the question, please?

Q. I'm asking you what knowledge you had that independent service organizations were actively attempting to take away service revenues from Kodak.

A. We had general knowledge from field reports. We knew some field engineers had left us to work for - to go into business.

Q. And this was a new phenomenon in around 1985?

A. It was getting more of a - more apparent than it had before, I think is the proper description.

Q. When you say "more apparent," was an attempt ever made to quantify it?

A. No, I don't think we really have any ability to quantify it.

Q. Did Kodak keep track of the machine [p. 46] populations for micrographics equipments in 1985?

MR. WALL: Do you understand what he means by machine populations?

A. You are talking about all the equipment that Kodak has -

Q. Sold.

A. Has sold over a period of time?

Q. Yes.

A. You try to understand that but there's no precise - there's no absolute way of knowing that.

Q. Did Kodak estimate what percentage of that population was on a Kodak EMA?

A. We talked about that. I don't think we could really - we really couldn't understand - you cannot track a piece of equipment, you do not know where it is after we sold it. So we did not have a number in terms of that.

Q. Was that the case both with micrographics and photocopy, in your experience?

A. Yes. That's true, because we don't - you have some feel for what it is but there isn't a way of tracking equipment.

Q. Now, this awareness of the competition [p. 47] from ISOs, did it relate to private accounts or government accounts or both?

A. What marketplace are you referring to?

Q. The ISOs in the micrographics area.

A. The knowledge I had?

Q. Yes.

A. I don't think we looked at it in terms of particular marketplaces. We were just aware that they were involved and we were aware of sales to them.

Q. Your specific knowledge of CPO Limited, where did that come to you from?

MR. WALL: This was switching to copy again, just for the record here.

MR. HENNEFER: Yes.

MR. WALL: I take it we are also switching time frames.

MR. HENNEFER: Right.

A. That came from the field.

Q. When were you first aware of micrographics, micrographics ISOs?

A. I think we had been aware of them in general for quite a while, because we had . . .

Q. Because you had?

[p. 48] A. I don't know of any start date but probably when I was national manager I was aware that there were ISOs involved in micrographics.

Q. And you were aware of these because you were selling parts to them; is that correct?

A. Yes. And from knowledge, as I said before, of field engineers who had left and it was our understanding they were going to service equipment.

Q. Did Kodak keep track of the amount of parts that were sold to third parties from the CES Parts Center?

A. We were generally aware of that because we know where we are selling.

Q. Was there a substantial increase in the number of those parts being purchased during the period just prior to 1985?

A. I don't know what you mean by substantial. There was an increase in that, you know, activity.

Q. Was that one of the factors that led to the review of April, 1985?

A. It was one of many things we were looking at at that time relative to that policy. [p. 49] And we considered quite a few things.

Q. Was there a discussion of whether there would be any impact on ISOs from the limiting of parts by CES Parts Center to them?

A. Was there any discussion on that?

Q. Yes.

A. Not that I recall.

Q. There was no discussion on that issue?

A. Discussion was primarily around the impact it was having on us.

Q. Was there any discussion of whether the ISOs would be allowed to purchase parts and inventory them themselves from Kodak's vendors and suppliers?

A. Which are you referring to and what time frame?

Q. 1985 time frame, micrographics.

A. In micrographics?

Q. Yes.

A. Could you repeat the first part of that then? I am sorry.

MR. HENNEFER: Okay. Do you want to read that back?

(The reporter read back the pending [p. 50] question.)

A. I don't think there generally was, because we were going to continue to sell.

Q. When you say "we were going to continue to sell," do you mean -

A. What they had been purchasing.

Q. So that issue did not come up because it was felt that the ISOs would still be able to get micrographics parts and so they would not seek to buy them from OEMs; is that correct?

A. I don't recall specifically talking about that. Our conversations were around our policy and what we should do.

Q. And not about the impact that policy would have on ISOs?

A. You know I don't recall all that conversation. But I think one of the things we did talk about was we agreed to continue to sell them parts.

Q. Okay.

A. We could have agreed not to sell them. We agreed to continue to sell them for the current products that they were servicing. So there was some discussion around that, because we said we [p. 51] would continue to do so.

Q. Why was it you agreed to continue to sell them the parts, your understanding?

A. We had been selling them parts, and I think we thought it was the fair thing to do.

Q. Okay. In April, 1985, Kodak had made a decision, did it not, to refuse to sell parts to new equipment starting with the Reliant 1000 and I believe the IMT 150 to

people who did not purchase parts directly from Kodak; is that correct?

MR. WALL: Just for the record, the decision was to not sell parts relating to those new products. You said parts to them, it sounded a little funny.

Q. Is that correct?

A. What - we set the policy not to sell them parts starting with the Reliant 1000.

Q. And other new equipment; is that correct?

A. And future products.

Q. And since then, what future products besides the Reliant 1000 have been added to that list?

MR. WALL: Well, I object. There's no

* * *

[p. 59] you experienced loss of business to ISOs for the service of micrographics equipment?

A. I don't think we know, because we don't end up talking directly to those customers.

Q. Okay.

A. It's not our policy. We generally wouldn't talk directly to those customers. We have general feelings for what they might be but we don't know.

Q. What were your general feelings at that time?

A. Well, I think in any industry it can be price, it can be performance.

Q. So it was your understanding that both price and performance were reasons why ISOs might have been chosen over Kodak?

A. I'm not aware of performance. Price is certainly an issue. I'm more -

Q. You are aware of switches that were made because of price?

A. In the feedback we have received from regional managers, the comments, to my knowledge, were more in the area of price than Kodak's performance on that equipment.

[p. 60] Q. What, in April of 1985, was your familiarity with the inventory levels for micrographics parts of specific items? Were those kept at fixed or predetermined levels at CESD Parts Center?

A. Individual parts?

Q. Yes, right.

A. I'm not sure quite what you mean by kept at predetermined levels.

Q. For example, how would CESD determine how many fuser rollers to have on hand?

A. Well, it's a function of demand and it's also a function of, you know, economics in purchasing parts from vendors, you know. It's some modeling technique that they use that takes into consideration several variables. But they are probably two of the major ones, that I recall.

Q. When you say they, who are the "they" that have modeling techniques for ordering or specifying how many parts should be ordered and kept in inventory at CESD Parts Control?

A. Parts Planning people within Parts Services would monitor that.

Q. Who was in charge of that in 1985?

* * *

[p. 62] levels or reduced?

A. General anticipation, that we could reduce the parts levels.

Q. The demand that you referred to that determined parts levels, was that based upon an historic demand?

MR. WALL: At what time?

MR. HENNEFER: We are in the same time frame here. April of 1985.

A. April, 1985?

Q. Yes.

MR. WALL: So you are asking him whether as of that time the demand level that was used to set inventory was historical demand?

MR. HENNEFER: Yes.

A. It was historical demand plus some anticipation, planning of the future.

Q. Anticipation of greater sales or greater demand?

A. Of change in sales.

Q. And when you say "change in sales," that could have been an increase or a decrease in sales?

A. Yes, it could have been.

[p. 63] Q. Of parts or of machines or of both?

A. We don't sell machines. But of parts. In Parts Services area, it would be a change in parts, either plus or minus.

Q. Were the demand for parts not calculated on the basis of machine populations, and an increase in machine populations would increase demand for certain parts, or was it solely on parts demands?

MR. WALL: I take it you mean wasn't that one consideration?

MR. HENNEFER: Yes.

A. You are looking at both, you are looking at demand and anticipated demand.

Q. Was the demand scaled down after April of 1985, the historical demand or the anticipated demand based upon the new products for the micrographics parts?

MR. WALL: For which products?

A. For products prior to RIM 1000?

Q. Yes.

A. I think it was. That was our intent, to scale that down.

Q. And why was that going to be scaled [p. 64] down?

A. Because we wouldn't have necessarily needed to have parts at the level we had them prior to that.

Q. Because you would be able to accumulate orders and then place those orders as they were accumulated; is that the thinking?

A. Yes.

Q. With regard to the policy that you were only going to sell new parts, that is parts to the Reliant 1000 and subsequent machines to direct purchasers from Kodak, how did you identify who was a direct purchaser as of April, 1985?

MR. WALL: Object to the question. It assumes a fact not in evidence.

MR. HENNEFER: Which is?

MR. WALL: Well, I'll go ahead and tell you in this instance. You are assuming that in April of 1985 they made a determination of who was a purchaser and who was not.

MR. HENNEFER: Well, if they didn't make a determination or couldn't, then answer it; say, "we didn't or we couldn't."

Q. Could you make a determination in April, [p. 65] 1985, when a part was ordered whether that part was being ordered by an owner of a Kodak Reliant 1000?

A. I would think they could. I'm not familiar with all the records out there. They would know if it was a part for that product. They would know who the customer was.

Q. And they could match that up when the part was ordered; is that correct?

MR. WALL: If you know.

A. I'm not sure exactly how they would do that.

Q. Did they do that, in fact?

MR. WALL: Who is "they"?

MR. HENNEFER: The people at Parts Services, of course.

A. Parts Services. That was the policy we set, for them to do that, to monitor that and to implement that policy.

Q. Yes. Do you know how that policy operated in practice?

MR. WALL: As of what time?

MR. HENNEFER: Talking about the same time frame, April of 1985.

[p. 66] A. Which policy, in terms of selling it?

Q. Yes. In terms of selling the parts for the Reliant 1000?

A. Do I know if it was implemented?

Q. Yes.

A. To my knowledge, it was implemented, but I don't have -

Q. But you don't know how?

A. Specifically how they did that?

Q. Yes.

A. No.

Q. Okay.

A. I don't know exactly how they did it.

Q. Who would have been aware of that at that time?

A. Manager of Parts Services would have implemented that policy.

Q. And who was that?

A. As I said, it's either Jim Wheeler -

Q. Or John Englert?

A. - or John Englert.

Q. In April, 1985, you have stated in your declaration that there was considerable sentiment for cutting off all parts of micrographics

* * *

[p. 71] Q. Okay. What was the primary reason you made that decision?

A. I think for all the things that we have been talking about, from, you know, reducing your assets, from looking at our customers and the satisfaction level we have with those customers as they look at Kodak, those are the types of reasons, you know, concerns from the field that were coming in about that which could impact our ability to sell product.

Those are the major considerations.

Q. Did you feel that ISOs that you had been selling parts to were taking unfair advantage of Kodak?

A. Well, to some - I don't know if unfair advantage is the right word. But certainly we were providing them with parts which we had invested a lot of money in and which they did not have to invest an equal amount.

Q. Did Kodak make a profit on the parts that it was selling in the micrographics area to ISOs in April of 1985?

MR. WALL: Objection. The question is compound, if you are talking about a lot of [p. 72] different parts, or it's vague, to the extent that you are trying to make some broad statement as to whether Kodak's aggregate part sales were profitable. And if that's your question, I'll object also on lack of foundation.

MR. HENNEFER: Read the question back, please.

(The reporter read back the pending question.)

MR. WALL: I take it you are standing with the question, counsel?

MR. HENNEFER: Yes.

MR. WALL: He wants you to answer that question, if you understand it.

A. I don't know if they got their full return back on those parts or not.

Q. You don't know whether they did or whether they did not?

A. The accounting system in Eastman Kodak Company is such that I am not sure if we got full return back from our research and development cost or not.

Q. Okay. When you say "full return," is that a term that includes research and development [p. 73] cost, as well as the cost of the parts and overhead costs and some other elements, is that what you are referring to?

A. Yes.

Q. And you were unable to CES Parts Center to determine whether that was the case or you do not remember; which is it?

MR. WALL: If it's either one of those. It may be a third option.

MR. HENNEFER: Or a fourth or a fifth.

THE WITNESS: Repeat the question, please.

MR. HENNEFER: Read the question back, please.

(The reporter read back the pending question.)

MR. WALL: Do you understand the question?

A. To my knowledge, we were unable to determine that full cost.

Q. In the accounting system of Kodak, you were unable to determine what the full cost of those parts were; is that correct?

A. That's correct.

[p. 74] Q. So you could not tell -

A. With my knowledge of that accounting system.

Q. They could not determine that?

A. Not do a profit.

Q. How were parts priced if not with regard to recovering a fair return on those parts when they were sold to ISOs from the CES Parts Center in April of 1985?

MR. WALL: Objection, no foundation the witness is competent to testify about that.

You may answer it, if you know the answer to it.

THE WITNESS: I am sorry, I want the question read back.

MR. WALL: Please read the question back.

MR. HENNEFER: That's fine.

(The reporter read back the pending question.)

A. I am not - I am not involved in parts pricing.

Q. Do you have an understanding, any understanding of how those were set?

* * *

[p. 77] A. I don't have personal knowledge.

Q. As to whether it was or was not implemented?

A. Whether it was or was not.

Q. Do you have any knowledge that anybody has told you of whether it was implemented or not, as opposed to personal knowledge?

A. I think Mr. Lorensen knows.

Q. Was it your understanding that it was not, in fact, immediately implemented?

A. No. I don't know whether it was or wasn't. As I said, I think Mr. Lorensen knows. He took over shortly thereafter.

Q. So you have no personal knowledge of that; is that correct?

MR. WALL: Of what now? Now I'm not sure what the question is. I am sorry.

You might just want to ask him does he know whether he had it implemented while he was there.

MR. HENNEFER: It's been asked.

MR. WALL: Well, did you understand that to have been asked?

A. If the question is, do I have personal [p. 78] knowledge of whether that policy was implemented immediately, I think is your words -

Q. Yes.

A. - I do not have personal knowledge, I am not sure.

Q. Okay.

A. I would have thought it would have been.

Q. You don't know, don't have any personal knowledge of that?

A. No.

Q. Do you have any additional knowledge of whether it was ever implemented?

A. This is as it relates to filling orders, not -

Q. Filling orders out of inventory rather than requiring that ISOs order parts in advance.

A. I think it was implemented, in just some general discussions I've had with people. I think the policy was implemented.

Q. You are presently responsible, Mr. Gross, are you not, for the implementation of Kodak's policy regarding parts for photocopy machines; is that correct?

A. Yes, that's correct.

[p. 79] Q. You are also responsible for the servicing of used copy machines by Kodak?

A. Our used equipment.

Q. I am sorry?

A. Our used equipment.

Q. Used equipment of customers, whether they were customers of Kodak or a broker or a third-party equipment dealer?

A. If you are referring to our servicing of equipment, I am familiar with what we are doing, yes.

Q. Okay. What do you understand the current policy of Kodak to be with regard to the sale of copier parts to third parties?

MR. WALL: You mean third-party service organizations?

MR. HENNEFER: Any third parties, with regard to any third parties.

MR. WALL: I guess I don't know what you mean by third parties. Anybody but Kodak?

MR. HENNEFER: Yes.

MR. WALL: Okay. So including Kodak customers.

MR. HENNEFER: Right.

[p. 80] A. We sell parts to Kodak customers, Copy Products, that purchase equipment from us. We do not sell parts, never have sold parts, to people who are not purchasing equipment from us.

Q. To your knowledge, was Kodak ever approached by any independent service organizations before they began servicing photocopy machines of Kodak to determine whether parts would be available for those service activities?

A. To my knowledge, no one approached us. No one approached me.

Q. Now, from your experience, how does Kodak determine presently whether a purchaser of parts was a direct machine purchaser from Kodak?

A. Repeat that, please.

MR. HENNEFER: Want to read that back for him?

(The reporter read back the pending question.)

A. It's my understanding we know who we have sold equipment to, and we know who we are selling parts to. Therefore, we can compare.

Q. Can you match those up on a computer [p. 81] when a part is ordered?

A. We match them up in some method, manual or computer. Some means.

Q. So with regard to photocopy equipment, you have and can keep track of people who have purchased photocopy equipment directly from Kodak; is that correct?

A. Yes.

Q. And match that up against parts orders when they come in; is that correct?

A. It's my understanding we can do that.

Q. And you do, in fact, in practice do that?

A. I don't think that's done on a routine basis. It's monitored.

Q. When you say it isn't done on a routine basis but it's monitored, what do you mean by that?

A. I'm not completely familiar, but I don't think every order is screened, if that's at that time, it's -

Q. How do they screen them if they don't screen every order? Is it a random screening or is there some mode or method to the screening?

* * *

[p. 88] MR. HENNEFER: I want his answers, counsel. I want the witness to answer and testify.

MR. WALL: The policy has been stated. You tried to restate it in a very misleading way and I object to that.

MR. HENNEFER: Okay. We'll go back to the question.

Q. Have there been discussions of preventing photocopy replacement parts for Kodak equipment from getting in the hands of independent service organizations?

A. Yes.

MR. WALL: Can I have that read back, please?

(The reporter read back the last question.)

MR. WALL: Let me ask you for a clarification. When you talk about photocopy replacement parts, are you talking about such parts after they have first come into the possession of Kodak or are you also talking about - again you have made inquiries in the past about parts from the OEMs themselves. I think the [p. 89] distinction is important in this case.

MR. HENNEFER: Either.

A. I'm not knowledgeable about OEMs, as I've said.

Q. Okay. Then ____

A. We have had discussions about, you know, our policy relative to selling parts to direct customers and not selling parts to people who are not our direct customers. We have had those discussions.

Q. Okay. And what, those discussions have been with regard to preventing replacement parts of Kodak photocopy equipment from getting into the hands of independent service organizations after Kodak has sold them?

MR. WALL: Of course he is asking about conversations of which you are aware of.

MR. HENNEFER: I'm going to object to your coaching the witness. I would like the witness' straight and direct answers. If he didn't have conversations, he can simply say, "I'm aware of none or there were none, to my knowledge."

I don't want counsel testifying, I would [p. 90] like to have the witness testifying. And if we have to go before Judge Schwarzer on this, there's going to be a very bad record from the standpoint of counseling the witness. I would like to repeat this question again -

MR. WALL: Let me say this before you do. There's two ways to do this. Obviously, you don't want me to do it the way I'm doing it. I will do it the other way. From now on if you ask a question that says "Has Kodak had discussions about" something, I will object to the question. And I will insist you only ask whether this witness has had discussions or is he aware of specific discussions of Kodak personnel. Because you can't ask the broad question, "Has Kodak had a discussion," and then object to my saying, "Well, I take it you are only asking about the ones that he knows about." Because Kodak is an enormous organization.

MR. HENNEFER: Okay. Do you want to read the last question back, please?

(The reporter read back the pending question.)

A. I am sorry, I still don't understand the [p. 91] question. As it started off it sounded like a continuation of another.

Q. Are you aware of any discussions within Kodak with regard to preventing photocopy replacement parts for Kodak equipment from getting into the hands of independent service organizations after Kodak sells them?

A. I think those discussions have taken place with Lynn Gleason, as I recall.

Q. Okay. Were you present at any of those discussions?

A. We have had general discussion about parts and implementation of our policies, so - and I've been involved in discussions with her in that area.

Q. And in connection with those you have discussed, have you not, the preventing of photocopy replacements parts from getting into the hands of independent service organizations after Kodak sells them; is that correct?

A. Sells them to whom?

Q. Sells them to anyone.

A. The parts that we are selling, to my knowledge, to direct customers, we are selling [p. 92] them to those customers. To our knowledge, those customers are using them for their equipment, to service their equipment.

MR. HENNEFER: Move to strike the answer as nonresponsive.

THE WITNESS: Sorry. I am trying to answer.

MR. WALL: Don't be concerned with the motion to strike.

MR. HENNEFER: Would you read the question again?

(The reporter read back the last two questions and answers.)

MR. WALL: There's no pending question.

Q. I will repeat the question again. In connection with your discussions of implementation of the policy, have you discussed with Ms. Gleason or anyone else preventing independent service organizations from getting replacement parts for Kodak photocopy equipment after they are sold by Kodak?

A. As I said before, we have had discussions about selling to direct customers. And are they using those - you know, in our [p. 93] knowledge are they using those parts, is that where they are going. And that's where the discussions have been. And some discussions around where are third-party service getting their parts.

Q. When you say where the parts are going that are being sold to direct customers of Kodak, have you specifically discussed whether those parties are reselling those parts to independent service organizations?

A. Yes, we have generally talked about those and looked at those parts being sold to direct customers, and

is our belief that they are using them for servicing of their equipment. We have had those.

Q. In those discussions, was it your belief that that was the case?

MR. WALL: Asked and answered.

You may answer.

A. Sorry. To my knowledge, the information I am receiving back from people, that is the case. We are selling them parts, they are using them for -

[p. 94] Q. And they are not reselling them to ISOs?

A. To my knowledge, they are not reselling them. The information that I said I received back is that they are using them for what we intended.

Q. Their machines?

A. Yes.

Q. And so there was no discussion in discussions you have described about preventing parts that are sold to direct purchasers of Kodak equipment from being resold?

A. I don't think generally because the question was the parts we are selling to the direct customers, to Lynn Gleason, to our assumption they are using them for our equipment, and the answer is yes. That they are buying parts and they are using them on their equipment. That is what our policy was and that is what we - you know, I was questioning her about the implementation and she assures me that to the best of her knowledge that's what's going on.

Q. Now, in these discussions, did you discuss what Ms. Gleason or anyone else's understanding was as to where independent service organizations were getting replacement parts for

* * *

[p. 96] possibilities discussed?

MR. HENNEFER: Right.

A. Field engineers.

Q. And what was discussed with regard to field engineers?

A. Are field engineers, you know, using the parts for what we gave them parts, which is to use on our equipment? Field engineers have an inventory of parts. The integrity of that inventory.

Q. So the discussion was to the effect that field engineers would be selling these parts to independent service organizations; is that correct?

A. That is a possibility. I mean we have write-offs in parts, we have lost parts. The question is always, you know, is it poor planning, is it poor management, is it poor bookkeeping, or always the possibility of them using those parts themselves for some reason.

Q. So, the discussion was that the field engineers might be taking parts that are accounted for as lost parts and selling them to independent service organizations, is that what the discussion [p. 97] was?

A. Or using it themselves.

Q. When you say "using it themselves," what do you mean by using it themselves?

A. For other than the service, you know, of Kodak customers where we have a contract with them.

Q. Do you mean servicing on their own time Kodak machines and using the parts for that service?

A. Kodak or other - or some machines, yes.

Q. I'm afraid I don't understand. Using Kodak parts for other machines, other manufacturer's machines?

A. No, on Kodak equipment.

Q. That was not under an EMA or a per call?

A. With us.

Q. You mean moonlighting, in effect?

A. It's always a question.

Q. Now, was it also a question that field representatives might be stealing parts from their inventory and selling them to independent service organizations?

A. I'm not sure, I guess it's stealing. [p. 98] But take parts out of their inventory and moving them. They have a lot of money tied up in parts.

Q. Moving them, you mean selling them to other -

A. Sure.

Q. - independent service organizations?

A. They have parts and tools and they are part of our big asset and we are trying to monitor that always out there. So there's discussions around that.

Q. When you say discussions around that, were any service representatives or field representatives accused of that?

A. Have there been?

Q. Yes.

A. Relating to Copy Products?

Q. Yes.

A. I don't think so, in Copy Products.

Q. In Micrographics products, have there been?

A. Yes.

Q. And specifically, what was the accusation, that they were selling them to independent service organizations?

* * *

[p. 103] A. She really had the responsibility at that time to discuss with the field, you know, what our current policies were related to our terms and conditions, you know, general policy. That's her area of expertise. And she was kind of a staff, if you will, staff person to the field to answer questions that they might have in any area.

Q. Why was she particularly interested in where ISOs were getting their parts?

A. As I said, I don't know why - I don't think she was particularly interested in that. It's just that there were conversations going on in those areas, from the field. You know, I don't know if they originated in the

field or from her. If they were, they weren't driven by a particular thing other than people seeking information.

Q. For what purpose were they seeking that information?

A. I think just understanding.

Q. Was there any attempt by Kodak once that information was received to cut off those sources of parts for ISOs for photocopy equipment?

A. I don't think in any of those - I don't think in any of those questions - or I don't [p. 104] think in any of those conversations we - you know, are aware of, or at least I'm not aware of sources. So you say Kodak cut them off, I don't think Kodak was - I don't think Kodak in total is aware. And I was not aware of, you know, a particular source.

Q. Were you a party to any discussions where it was discussed that if sources were found by Kodak, they would be cutoff?

A. I think I've said that if we were aware of a Kodak customer where we had sold them parts, were selling parts, we would have had conversations with them. And discouraged that from taking place.

Q. Discouraged that by telling them to stop or be cutoff?

A. I think we would try to work it out with them to stop doing that.

Q. And if they did not stop?

A. I think we would probably discontinue selling them.

Q. Parts?

A. Parts, yes. You know, it's a hypothetical.

[p. 105] Q. But that never occurred, to your knowledge?

A. Never, to my knowledge, no, it didn't occur.

Q. Would you refer to what has been produced as document number 1284 through 1286, which is the April 12, 1985 memorandum to district sales managers and district service managers, from you and J.A. Lacy.

MR. WALL: Let me just state for the record, we did not bring with us a set of the documents that were produced, some 3,500 or better pages. I take it what you are referring to is the exhibit to the Declaration, Exhibit 1 to his Declaration; is that right?

MR. HENNEFER: Right.

THE WITNESS: There's no number.

MR. WALL: That's what we have it as.

MR. HENNEFER: I discussed earlier this morning with Mr. Romeyn what we had done in the past. And I had thought that this was what we had agreed with Donn to do on these depositions, is just to have two sets of the documents with numbers so that we would not attach the exhibits

* * *

[p. 138] that parts would not be purchased for anything but for use in a machine that was purchased from Kodak; is that correct?

A. Right. Just want to monitor the policy that we set, which was important to us, was implemented.

Q. And so that those parts do not get to ISOs as well; is that correct?

A. So that - yes. So that those parts stay within - those parts go to the dealers that we anticipated them.

Q. And are used in the machines that you want them to be used in?

A. And are used in those machines.

Q. Is that correct?

A. Yes.

Q. Was any attempt with regard to photocopy parts made to assure that no extraordinary number of parts was ordered for a particular photocopy machine owner, so that parts would be assured of being used for the maintenance or repair of the machine that was bought directly from Kodak, the machine or machines?

A. Yes, I think that was generally looked [p. 139] at as, you know, is this a reasonable amount of parts. It's very difficult to tell, you don't know what they are doing or how they are servicing or how many parts they are using. But looking for some level of reasonableness to what they are doing.

Q. And the purposes are the same, to assure that those parts went into a machine that was purchased directly from Kodak?

A. Yes.

Q. And to assure that those parts were not used by ISOs?

A. To assure that those parts were purchased and used as we agreed with that particular customer.

Q. And not resold to ISOs; is that correct?

A. Not resold to anybody.

Q. Including ISOs?

A. Yes.

Q. Do you have any information that parts were being resold to anybody but ISOs if they were being resold on that basis from people who purchased parts?

A. I'm not aware of any.

* * *

EXHIBIT H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

-----x
IMAGE TECHNICAL SERVICES, INC.,
et al.,

Plaintiffs,

- against -

EASTMAN KODAK COMPANY,
Defendant.
-----x

No.
C871686
WWS

DEPOSITION UPON ORAL EXAMINATION OF:
Edward V. Ince

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: December 9, 1987

TIME: 9:36 a.m.

CONFIDENTIAL INFORMATION APPEARS ON PAGES
59 AND 60

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 82] EDWARD V. INCE - DX BY MR. HENNEFER

Q. What makes a person eligible to purchase a part in the Micrographics area for parts prior to the Reliant 1000?

A. My understanding is that for the older equipment, that if that individual has purchased parts in the past, that they are eligible to purchase parts at the present time and into the future.

Q. So only individuals then that show up on the screen that Kodak knows has purchased micrographics parts in the past are eligible then to purchase any micrographics parts, when we say any, other than the parts for machines after the Reliant 1000; is that correct?

A. That is correct. But there would have to be an indication to the individual filling the order whether that customer is a non-user in the context of Business Equipment, BIS.

Q. That is had or had not purchased equipment directly from Kodak in the Micrographics area?

A. That's correct. There would have to be that indication. Because if we have a marginal inventory situation on that part, then there would [p. 83] be a delay involved in filling that order. So there would have to be some indication as to the eligibility of that purchaser.

Q. If the screen showed that the entity ordering the part had not purchased photocopy equipment, then no parts would be sold to them; is that correct?

A. If the screen showed that they had not purchased copier equipment.

Q. From Kodak.

A. From Kodak. I don't know that the screen would show.

Q. It -

A. It might show it that way, it might not.

Q. Yes.

A. But if it indicated they were not eligible to receive the part through whatever indicator, and I just don't know what terminology might be on the screen, then the part would not be shipped.

Q. What other elements besides non-ownership of equipment purchased directly from Kodak would make a person ineligible to order parts from the Parts Center?

[p. 84] MR. WALL: For what kind of parts?

MR. HENNEFER: For either photocopy or micrographics.

A. What else might make them not eligible?

Q. Besides having not purchased the equipment directly from Kodak.

MR. ROMEYN: Bad credit.

MR. WALL: I take it you are excluding things like bad credit history or do you want that in there?

MR. HENNEFER: No, I want anything that Mr. Ince is aware of that the CESD organization has established makes somebody ineligible to order parts, besides the fact of not having purchased that part before or

having purchased equipment directly from Kodak, those are the two he has already testified to.

A. I can't speak to the credit part. I'm sure there are procedures that deal with that, I am not familiar with those procedures.

Q. Okay.

A. But in the context of this, I would expect, but I have no personal knowledge, but I would expect that if a third-party service [p. 85] organization which was known to be attempting to purchase parts from us to use those for use in the servicing of other Kodak copiers, that they would not be eligible to receive those parts.

And the example I'm thinking of now is a third-party service organization that might have purchased a copier from Kodak. Third-party service organization purchased a Kodak copier from Kodak, parts would be made available for the service of that copier only. If it were known that that purchaser were attempting to purchase those parts to use them to service copiers from others, it would be so designated that they are not eligible to receive those parts.

Q. Do you know whether any such incidents have occurred, such as you have just described?

A. Specifically, I do not.

Q. In general, do you know whether that's ever come up at CESD?

A. You mean that that has occurred?

Q. Yes.

A. I do not.

Q. Are you aware of what the policy with regard to third-party service and parts is for

* * *

[p. 104] there a distinction between parts for micrographics equipment in price that is sold on a per call basis, is sold to a self-servicer or is sold to an independent service organization?

A. It's all the same price. I know of only one price on a part.

Q. Is that right? There's a single price that's been established by the business unit?

A. To my knowledge, there's a price, that's correct.

Q. And whether that's sold on a per call basis to a third party or sold to a self-servicer or sold to an independent service organization, it would be the same price; to your knowledge?

A. To my knowledge, the same price.

Q. Are you familiar with any of the machine population of either copiers or micrographics equipment that is out in the field, that's been sold by Kodak and still in use?

MR. WALL: Could you read that back?

(The reporter read back the pending question.)

A. I'm not sure what you mean by "familiar with population."

[p. 105] Q. Does CESD or do the business units trace that?

A. What is the population?

Q. Yes.

A. In other words, what are the numbers of units that are placed?

Q. Yes.

A. Yes. That is tracked in Copy Products.

Q. Or in BISD? I should say is it also tracked in BISD, if you know?

A. Well, it is - it is not as - it's not at all as clean in BISD.

Q. When you say "it's not at all as clean," what do you mean by that?

A. Well, in Copy Products, there is rather diligent recordkeeping of every copier that is produced and where it is, whether it's being used for demonstration, whether it's being used overseas, whether it's being used in-house by Kodak organizations somewhere, whether it's in tests, whether it's been scrapped, whether it's on rental, whether it's sold, whether it's come off rental and is in reconditioning. There's a diligent recordkeeping process because in many [p. 106] cases those are Kodak assets. There's a high percentage of rental and Kodak assets. And so the whole process is structured to keep very accurate records of that.

And so I answer that yes, that the population is tracked carefully in Copy Products.

I have not seen that kind of reporting with regard to business equipment in BIS. It's rather reporting of how many units were sold in a year, that certainly is known. But what happens to them and where they have gone, I have not seen reports like that. We can tell you how many are under contract. Nowhere near the resolution of population.

MR. ROMEYN: Off the record.

(There was a discussion off the record.)

Q. With regard to the tracking of photocopy machines, does Copy Products or CESD, but I assume it would be Copy Products, track the number of EMAs and per call that are being implemented on its photocopy machines -

A. Right, yes.

Q. So then they could establish from those - or I should ask you, can they establish [p. 107] from those how many of those machines are either being self-serviced or serviced by some third party?

A. We know how many machines are out there. We know how many machines are on rental. We know how many machines are on contract.

Q. EMA contract?

A. We know how many machines are on per call. I suppose as a matter of just mathematical subtraction, you could therefore figure out how many were not accounted for.

Now, what's happening to those that aren't accounted for would be I suppose speculative, but that

would be the group within which there could be third-party activity.

Q. Or self-service as well; is that correct?

A. Self-service as well, that's right.

(There was a pause in the proceeding.)

Q. Are you aware from either your experience here in Rochester or any field experience of people, whether customers who have Kodak photocopy equipment or micrographics equipment and also have EMAs on that equipment,

* * *

[p. 112] situations in which independent service organizations claimed to have been given assurance that parts would be made available to them to service either micrographics or photocopy machines?

A. No.

Q. Have either micrographics replacement parts or photocopy replacement parts been supplied on a different basis, that is any of the terms and conditions or price, to one independent service organization as distinct from other independent service organizations?

MR. ROMEYN: Could you read that back?

(The reporter read back the pending question.)

A. No. Not to my knowledge.

Q. Did it become in the 1985 or post 1985 period an area of more concern to Kodak whether independent service organizations were going to be able to get photocopy parts?

MR. WALL: Did you say the post 1975?

MR. HENNEFER: I believe I said '85.

MR. WALL: It's post '85, right?

MR. HENNEFER: Read it back.

[p. 113] MR. WALL: I don't think you need to. We are talking about post '85. We understand that.

(The reporter read back the pending question.)

A. Did it become a concern to us whether they could get parts? -

Q. Yes.

A. I'm really not sure how to answer that, or what you mean. A concern to us where they could get parts from whom, or whether they could get parts from somewhere else?

Q. Yes, whether they could get them from any source.

MR. WALL: Including Kodak?

MR. HENNEFER: I assume his answer is they can't get them from Kodak, so I was really interested in any other source.

A. I don't want to convey that we were preoccupied with this issue, because we were not. This was not a big deal.

Q. Why -

A. We established our policy. There is always a concern as to whether our own people [p. 114] might be

providing parts to others, whether there's any conflict there. There is always a concern as to whether people that leave us and have access or know the routine, whether those people might be obtaining parts from us. I mean that's obviously a concern. But it wasn't any great escalation of concern in 1985.

Q. Why would it be of concern at all, that they would obtain parts, other than what you have described, that it would be a violation of your employee's duties to you or of your policy?

A. Well, that would be a concern.

Q. I understand. Other than those concerns, would it be of concern to you for any other reason?

MR. WALL: That an employee left the company and somehow was obtaining parts?

MR. HENNEFER: Yes.

THE WITNESS: Oh, is that the question?

MR. WALL: I think it was.

MR. HENNEFER: Would you want to read the question back please?

(The reporter read back the pending question.)

[p. 115] MR. HENNEFER: Off the record.

(There was a discussion off the record.)

Q. Other than your concern that employees might be violating their obligations and duties to Kodak by supplying photocopy parts to third parties, why else would Kodak be concerned with whether third-party service organizations were getting photocopy parts?

A. Well, for one thing, we spent a lot of money on parts. Parts represents a significant expenditure for us. And we are attempting to provide the highest quality service we can. But at the same time, manage our costs so that we can be competitive in the marketplace with the Xeroxes and the IBMs. And so cost control is a big - that's a big deal. And we are very interested in where our parts are going and who is using them and how they obtain them. And they are for the use of our people and our customers. And if they are going other places, that's a concern. We want to know about that.

Q. Are you aware of any discussions that have been had within Copy Products or BISD, or in connection with CESD, about pricing parts to [p. 116] third-party service organizations at a higher level or a significantly higher level than those on a per call basis in order to assure cost control, as you termed it, or managing costs, just so you would get an adequate return on that?

A. Pricing the parts higher to third-party service organizations?

Q. Yes.

A. Never.

Q. That's never been discussed as a way of assuring that you would get revenues from those parts that were commensurate with the expenditures put it?

A. Not by me or anyone in my presence.

Q. You have never heard that idea put forward?

A. Never.

Q. If the significant expenditures and management of cost and cost control elements you said were of concern to Kodak, were of such concern, do you know why it has not been considered that a way of recouping these might not be by significantly increasing prices to third-party service organizations for parts?

[p. 117] MR. WALL: Objection to the question, it assumes facts not in evidence. The witness stated it has not been considered by him or anyone in his presence.

On that basis, you may answer.

A. What you characterize in that question would not have fundamentally matched our overall strategy as a service organization. We are not in business to sell parts. So we really have no - we have no strategic thrust or interest in developing a parts resale business for profit. That's not the purpose of our existence.

Q. And I take it when you say "we," you are talking about decisions made at Copy Products and BISD for you to carry out; is that correct?

A. Both, both CESD and the Copy Products organization and BISD. The strategy is for the overall Copy Products business or BIS business to be competitive with their competitors, whether it be Xerox, IBM, Bell & Howell, whoever, and to employ service as a vehicle to be competitive. There's no interest in trying to make a business out of selling parts at whatever prices to make a profit. That's not a fundamental strategy.

[p. 118] Q. So the parts and service are really driven by, if you will, the overall business unit's business, that is BISD's business or Copy Products?

A. That's correct.

Q. And it's not, if you will, a profit center and isn't considered that way; is that correct? When I say a profit center, I'm talking about parts.

A. Parts is clearly not a profit center.

Q. Nor is service?

A. Nor is service. Nor is there any strategic thrust that I'm aware of to make a business out of selling parts at a profit.

Q. Okay. Were you aware through any source prior to your coming into CESD of any attempts to limit either the sale of micrographics parts to third-party organizations or to try to establish and cut off any sources of parts that might be going to independent service organizations in the photocopy area?

A. None whatsoever.

Q. In the 1985-1986 period, were there problems that came to your attention, or alleged

* * *

[p. 127] ask you. What is the case for micrographics equipment? Does Kodak manufacture more or less than 50 percent of its parts?

A. Don't know. I do not know. I really don't know those percentages. That's speculation on my part.

Q. Yes.

A. A high percentage of parts are purchased. But whether it's 50 percent, I just don't know.

Q. In both Photocopy and Micrographics?

A. In both cases, a high percentage of parts are purchased.

Q. Who would know those numbers exactly?

MR. WALL: Well, I think among other people, you would. The information that we provided you, I think we have provided you with a complete list of the parts which we procure from others. And I assume a count. And I think we have also provided you with the total number of parts. So I think you have got that information at your fingertips, or at least at your law clerk's substantial fingertips.

A. I would really be guessing. I know that [p. 128] there's a lot of purchased parts. That's all.

Q. Do you or have you ever had dealings with the original equipment manufacturers who purchased parts for - excuse me, who manufacture parts for Kodak's purchase?

A. I have had - I need to clarify in my own mind. I guess, what you mean by original equipment manufacturer.

Q. I would include in that anyone who manufactures a part for use as a replacement part in Kodak's photocopiers, micrographics machines?

A. A parts supplier?

Q. Yes.

MR. WALL: You may just as a usage want to distinguish, because I think Kodak's usage is different than yours. Those part suppliers are not considered to be OEM suppliers.

Q. Okay. Kodak distinguishes, does it, between an OEM, somebody who manufactures a part put in the original machine, and somebody that supplies the parts?

MR. ROMEYN: No.

A. No. The term OEM to us for clarification is a firm that provides a product to [p. 129] us, such as Canon provides a copier to us. We view Canon as an OEM. Canon provides the product and we resell it. Obviously, Canon also provides the parts for the copier. So in that case, they are an OEM supplier of the product and then a parts supplier.

But there are many parts suppliers that we purchase parts from, we would not refer to them as OEMs.

MR. ROMEYN: The basic distinction being between a finished product supplier and a parts supplier.

Q. So you would consider to be produced parts to be put into Kodak machines?

A. Sell us motors.

Q. Or fuser rollers, whatever?

A. That's right. That's a parts supplier.

Q. Now, the question is have you had any dealings with parts suppliers?

A. No.

Q. Have you fielded any inquiries or dealt with any problems that arose concerning whether parts suppliers would sell parts to parties other than Eastman Kodak?

[p. 130] A. Zero.

MR. HENNEFER: Do you want to take a quick break? We have been going about an hour and a half.

THE WITNESS: I was about to ask for one, too.

(The proceeding recessed at 2:58 p.m.)

(The proceeding reconvened at 3:15 p.m.; appearances as before noted.)

EDWARD V. INCE, resumes:

DIRECT EXAMINATION BY MR. HENNEFER
CONTINUING:

Q. Are you aware of how inventory levels for specific parts, either in the Photocopy or Micrographics area, were set at CESD pre 1986?

A. Well, when you say how they were set, if you're speaking to goals, is that what you mean?

Q. Yes.

A. What goals were established for inventories pre 1986?

Q. Yes.

A. That was not the -- the business units didn't come into existence until 1985, late 1984, beginning of 1985. At that time, return on assets [p. 131] became a clear area of goal setting and financial measurement and management. And there was a lot more energy and visibility

around that subject, asset management, in the 1985 period. So, inventory levels I would have to say, inventory levels became more visible at that period of time.

Prior to that, there always was interest in inventory obviously. You know, in business you are interested in inventory. But I think the energy level went up in 1985 because of return on asset.

Q. At CESD, how did you deal with this new emphasis of return on asset, what did it mean at CESD?

A. Well, in my prior position as field manager of Service, I had been very interested in field inventory, meaning the inventory that was out there with service reps in the trunks of cars and in district stocks.

Q. Which was substantial, was it?

A. Yes, it is substantial. I had great interest in that because I was managing a field operating organization. And we had some measures on inventory and tried to control inventory per [p. 132] unit, inventory per copier. And we attempted to drive that down.

And in so doing, what was happening was that some of those parts were being sent back to the main Parts Services organization.

Q. Rather than being in the trunks of cars or -

A. So we were really suboptimizing that, in that we were squeezing that field inventory down, but we were really just moving it around. And it came back over here in Parts Services.

And when the business units came into play, everyone began to ask better questions about the business,

because managers began to look at the total business as a business rather than looking at functional pieces of the business.

Q. When you say "the total business," that is, for example, the total Copier Products business or the total BISD business?

A. Yes, the total Copy Products business. And the questions got a lot better. And the performance measurement got a lot better. And that's when the emphasis on managing overall inventory became very clear, and the fact that our [p. 133] inventory position was high, still is to some extent. But we continue to want to drive that total inventory down.

Q. Who determines what the inventory is at CESD with regard to Copier Products replacement parts?

A. Who determines what it is or what it should be?

Q. What it is.

A. Well, that's a measurement - that's strictly both a physical inventory exercise which takes place which is counting parts, that's done on an audit basis routinely, and an accounting method of measuring what does your accounting system say you have.

Now, that's the what is. Now, what should be -

Q. I included in what is what's ordered. If you have, if you will, one gross of parts, whether you order

another gross or whether you let that one gross deplete.
When I say what it is at any given point of time -

A. Oh, I am sorry.

Q. Yes.

* * *

EXHIBIT I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al.,	:	No.
	:	C871686
Plaintiffs,	:	WWS
-against-	:	
EASTMAN KODAK COMPANY,	:	
Defendant,	:	

DEPOSITION UPON ORAL EXAMINATION OF:

Lynn M. Gleason

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: December 10, 1987

TIME: 9:44 a.m.

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 19] LYNN M. GLEASON- DX BY MR. HEN-
NEFER is that correct?

A. Yes.

Q. You were a specialist in Customer Technical Ser-
vices; is that right?

A. Yes.

Q. And what did you do as a specialist in Customer
Technical Services?

A. I dealt with pertinent business issues that
affected our marketing field personnel, answered ques-
tions for them on various business-related subjects

Q. Is that a part of CES?

A. No, it's not.

Q. What division is it under?

A. You would classify it as Marketing.

Q. When you say business-related questions were
answered, what do you mean by business-related ques-
tions? Can you give me an example?

A. Yes, I can give you many examples.

Q. Would you give me a couple just so I get an idea
of what you were doing in that position?

A. Sure. If a sales rep, for example, had a question on how to order an alteration for a [p. 20] piece of equipment, they would call in to Customer Technical Services and ask, you know, "Where do we go? Who do we call? What do we do?"

Q. So you were sort of technical, you would tell them what to do or where to go?

A. I told them where to go.

Q. Rather than actually answering the question?

A. Well, it just depended on what the subject matter was.

Q. Sometimes you would answer the question, you provided technical support as well?

A. Yes.

Q. And that was with regard to what kind of machines?

A. Ektaprint copiers.

Q. All Ektaprint?

A. Yes.

Q. You are an Ektaprint specialist?

A. Yes.

Q. And do you have any experience in any other equipment?

A. No.

Q. None at all, aside from your IBM [p. 21] computer?

MR. WALL: You mean have her job responsibilities dealt with any other Kodak equipment other than copiers?

MR. HENNEFER: Yes.

A. No.

Q. From 1983 through 1987 you were with CES as a business specialist; is that correct?

A. Yes.

Q. And what did you do as a business specialist with CES?

A. Dealt with business-related issues that affected our field service people.

(There was a pause in the proceeding.)

Q. You said as a business specialist at CES you were involved in answering business-related questions. Can you give me an example of what business-related questions you dealt with at CES in the 1983 through 1987 period?

A. I dealt a lot with terms and conditions of contracts, service contracts that we offered. And if, for example, a service manager or one of our field management people would call in to ask if - they very rarely would read the terms and [p. 22] conditions of the contract, so they would call in for just interpretation purposes.

Q. When you say terms and conditions of contracts, you are talking about EMA contracts on Ektaprint solely or were there other terms and conditions on contracts that you dealt with?

A. Terms and conditions for equipment maintenance agreements on Ektaprint copiers only.

Q. Only. Did you deal with terms and conditions of CES Parts Services, parts catalog terms or sales of parts, anything like that?

A. That was not part of my job responsibility.

Q. As a business specialist in CES, was that position reorganized in the reorganization that took place in the late '84, early '85?

A. To a certain degree.

Q. What I'm trying to ask you, there was a group within CES that was divided into Copy Products and divided into BIS, as I understand it, in late 1984 or early 1985.

Were you, at that time, put in the group at CES that dealt with Copy Products?

A. Yes.

* * *

[p. 30] Q. In what position with Kodak did you first become familiar with what Kodak's policy with regard to sale of copier parts was?

A. When I became involved with CES.

Q. Okay. That would have been in or about 1983; is that correct?

A. It was after I got involved with CES.

Q. Which was about 1983; is that correct?

*

MR. WALL: He's just pinning down that your involvement with CES was in 1983.

A. Correct.

MR. WALL: Not necessarily your involvement with that issue at that time.

THE WITNESS: Right. That's what I was trying to make clear.

Q. And how did you become familiar with that?

A. With what?

Q. With Kodak's policy with regard to replacement parts?

A. Through discussions with people in CES.

Q. With whom did you discuss this?

A. With my management.

Q. And what was your understanding when you [p. 31] first became aware of Kodak's policy with regard to replacement parts for copiers of what that policy was?

A. That we sell parts to our direct Copy Products customers who have purchased equipment from Kodak.

Q. Only?

A. And to internal Kodak people, you know, field engineers.

Q. To those groups only?

A. Yes.

Q. What was your understanding of the reasons for this policy?

A. To make sure that we protect our own assets, to make sure that we maintain our quality of service that we are providing to our direct customers.

Q. When you say "to make sure we protect our own assets," what did you mean by that?

A. Our assets being our equipment, to make sure that we continue to provide the quality service that we have since the beginning of the program.

Q. Did it deal with preventing third [p. 32] parties from maintaining the equipment as well?

A. No.

Q. Was this policy, in or about 1983 when you first learned about it, in writing?

A. Not that I'm aware of.

Q. You never saw anything in writing about that when you first came to CES?

A. No.

Q. Okay. Do you know whether that was conveyed to customers or people who were buying parts for Kodak Ektaprint copiers?

MR. WALL: I take it you are asking whether it had been conveyed?

MR. HENNEFER: Yes, in or about 1983.

A. I don't know.

Q. You don't know?

A. No.

Q. Do you know in 1983 or 1984 of any communications, letters or verbal communications that went out to customers with regard to this policy?

A. I'm not sure.

Q. When you say you're not sure, does that mean you don't know of any or you are not sure

* * *

[p. 41] Q. Are you aware of CES's replacement parts principles that are part of the parts catalog?

A. No.

Q. Have you ever been aware of them?

Let me show you what I'm talking about here.

(There was a pause in the proceeding.)

Q. First let me ask you whether you are familiar with the CES parts catalog? Are you?

A. I have never seen one.

Q. They are on fiche and given out to customers who order parts from CES. Are you familiar with that?

MR. WALL: That's not true. They have to buy it.

MR. HENNEFER: Well -

MR. WALL: You can order it.

MR. HENNEFER: Well, given out at a cost, if you will.

MR. WALL: But the implication of your question is buy a part, get a catalog.

MR. HENNEFER: Get a catalog, buy a part.

MR. WALL: Right. That's the way it [p. 42] worked.

Q. Do you understand what I'm talking about, the parts catalogs?

A. I understand what you are talking about.

Q. And were you familiar with the parts catalogs, have you ever looked at one or used one?

A. No.

Q. No. You have never used a parts catalog?

MR. WALL: Go ahead and answer.

A. No.

Q. Okay. You never used a parts catalog while you were at CES or were familiar with one?

MR. WALL: Both those questions have been asked and answered.

MR. HENNEFER: I guess I just find it hard to believe the answer.

MR. WALL: Well, that's too bad. I don't find it hard to believe at all.

MR. ROMEYN: Since none of the witnesses so far have ever seen that.

MR. WALL: The only people who have seen that apparently are your clients.

MR. HENNEFER: It seems a little [p. 43] incredible that someone working at CES is not familiar with the

catalog at all that contains the parts that people buy from CES.

MR. WALL: Frankly, that shows that you have very little understanding of the CES organization. I would be surprised if five percent of the people in CES knew of that replacement parts principle.

MR. HENNEFER: It's a little like a lawyer saying he practiced in Federal Court and never seen Fed. Sup. or Fed. 2nd.

MR. WALL: It's nothing like that.

MR. HENNEFER: Tools of the trade.

MR. ROMEYN: It's not the Bible.

Q. Were you ever aware or would you participate in any discussions about the revision of either the replacement parts principles or the terms of sale that are in the catalog?

A. I don't understand the question.

Q. I'll ask you, were you aware in 1985 and 1986 that the terms of sale under which replacement parts were sold for Ektaprint copiers were changed?

A. No.

* * *

[p. 50] do anything besides keeping them informed of Kodak's policy with regard to servicing of broken equipment?

A. No.

Q. Did Kodak keep track of the development of third-party servicers with regard to Ektaprint copiers?

A. Yes.

Q. Did you participate in keeping track of the development of third-party servicers for Ektaprint copiers?

A. I need a clarification for that question. "Development," I don't know what that means.

Q. During the period from 1985 when you first became aware of third-party servicers for Ektaprint copiers through the present, have a number of businesses either begun or been more active in the marketplace in the servicing of Ektaprint copiers, from your knowledge?

A. Yes.

Q. When I speak of development of third-party servicers, I'm speaking of new businesses and existing businesses getting [p. 51] larger. That's what I'm referring to when I say develop.

Do you understand that?

A. Yes.

Q. Okay. Did Kodak keep track of the development of third-party servicers in Ektaprint copiers?

MR. WALL: I object to the question insofar as it asks the witness to speak to what Kodak as an entity has done. If you want to ask her what she has done or what people of whom she is aware has done, that's fine.

MR. HENNEFER: The objection is noted. But if she did it or she has knowledge of somebody at Kodak

doing it, Kodak was doing it because they are agents and employees of Kodak. And I think it's being obstructionist.

MR. WALL: That's a legal position. If you want to ask the question in another way, we'll move on and you won't have to waste time.

MR. HENNEFER: Do you want to read the question back?

(The reporter read back the pending question.)

[p. 52] A. Yes.

Q. And did you participate in keeping track of the development of third-party servicers in Ektaprint copiers?

A. Not with the way you describe the word development, no.

Q. What did you do with regard to gathering information on third-party servicers of Ektaprint copiers?

A. My involvement was strictly to determine when a part order was placed through Parts Services and there was a question as to whether the individual placing the part order was a direct customer of Eastman Kodak Company or was not a direct customer, I would have that determined and would keep a list of those requests, to my knowledge, to make sure that I knew what was going on.

Q. And who made those requests?

A. What requests?

Q. The requests you have just described?

MR. WALL: Which ones? She described two.

Q. The requests for parts.

[p. 53] A. Various companies throughout the United States.

Q. Did you keep track of the companies that made the requests for parts for Kodak Ektaprint copiers?

A. Yes.

Q. Okay. And kept track specifically of the ones where they were not direct purchasers?

A. I kept track of all requests, regardless of whether they were direct purchasers or not.

Q. You kept track of requests even of people who were entitled to buy Ektaprint parts; is that correct?

A. Yes.

Q. And you kept special track of those?

A. I kept track of them.

Q. Did you make any special effort to keep track of those who requested Ektaprint parts who were not purchasers directly from Kodak of Ektaprint copiers?

A. I noted them on a different list.

Q. Why did you note them on a different list?

A. So I could keep track of who we sold [p. 54] parts to and who we hadn't sold parts to.

Q. And who was entitled to buy those parts and who was not?

A. Yes.

Q. Why did you keep on a special list, on a separate list, if you will, track of the individuals who asked to purchase parts for Ektaprint copiers but who were not entitled to do so?

A. So when Parts Services called me and said that so and so had called and had called already, I could very easily refer to the list and say, "Oh, yes, here it is," instead of going through a larger list. Just to be able to answer more quickly.

Q. And why would Parts Services call you to inquire about that?

A. Because I made the direct contact with the field to determine whether someone was a direct customer or not. They very rarely would call.

Q. Do you know what other uses were made of the list?

A. No.

* * *

[p. 56] half.

MR. WALL: Okay.

(The proceeding recessed at 10:57 a.m.)

(The proceeding reconvened at 11:09 a.m.; appearances as before noted.)

LYNN M. GLEASON, resumes:

DIRECT EXAMINATION BY MR. HENNEFER
CONTINUING:

(The reporter read back the last three questions and answers.)

Q. Were you aware of any claims by third-party servicers of Ektaprint copiers that they had been able to purchase parts for those copiers in the past?

MR. WALL: From Kodak?

MR. HENNEFER: From Kodak.

A. Yes.

Q. Okay. And who made such claims to you?

A. Paul Hernandez.

Q. Any others?

A. Not that I can recall.

Q. Was any effort made to investigate whether those claims were true?

A. Yes.

[p. 57] Q. And did you conduct that investigation, were you aware of the results?

A. Yes.

Q. Did you actually conduct the investigation?

A. No.

Q. Who did?

A. Parts Services.

Q. And they reported back to you?

A. Yes.

Q. And what did they report?

A. That Hernandez had purchased a variety of parts from Parts Services.

Q. For the Ektaprint?

A. Not just Ektaprint copier parts.

Q. But had he purchased Ektaprint copier parts as well from Parts Services?

A. Yes.

Q. And was an investigation made as to why Parts Services sold those parts to him?

A. Yes.

Q. Did Parts Services make that investigation?

A. Yes.

[p. 58] Q. Okay. Did they report the results of that investigation to you?

A. Not directly to me, that I can recall.

Q. Did you learn of the results of that investigation?

A. Yes.

Q. Who did they report it directly to?

A. I don't remember.

Q. What were the results of that investigation?

MR. HENNEFER: The record should reflect the length of time, pause.

MR. WALL: Well, the record will reflect that the witness is trying to think of a thoughtful answer to the

question. And I object to the tactic. You are trying to put pressure on the witness to answer quickly and I object to it.

MR. HENNEFER: No, I'm not. I just want the record to reflect that after many of the questions, we are talking not a few seconds, but minutes pause.

MR. WALL: We are not talking minutes. There hasn't been a question yet when the witness has paused for minutes.

[p. 59] MR. HENNEFER: The last one was two or three minutes.

MR. WALL: That is flatly untrue.

MR. HENNEFER: I was looking at my watch.

MR. WALL: The witness will take as long as she wants to answer.

MR. HENNEFER: She can. She can.

MR. WALL: What's the relevance if she's taking time to think about it? Tell me the relevance.

MR. HENNEFER: I will tell you. We have scheduled one day for these depositions and we have a good deal of information we want to cover in connection with the summary judgment motion. And if I have to make an application for additional discovery, the record should reflect how difficult it has been, certainly in the first day and in this day, to cover material. That's the relevance.

MR. WALL: Fine, that's your position. I'm not going to address your position now, even though I disagree with it, because I don't want to take the time and you shouldn't either.

[p. 60] MR. HENNEFER: Fine. You asked me for it. That's why I gave you an answer. If you want to rebut it and take the time, you can. You asked for that relevance. I gave it to you.

MR. WALL: Let's go. Would you like the question read back? Why don't we do it, have the question read back, at the risk of taking any more time.

(The reporter read back the pending question.)

A. I don't believe that I can give you all of the results of that investigation.

Q. Do you recall anything about what that investigation turned up?

A. Yes.

Q. Okay. Would you tell me just what you recall?

A. That the majority of the parts that Hernandez had ordered from Kodak were micrographics parts.

Q. Did it turn up that he had ordered some Ektaprint copier parts?

A. Yes.

Q. And that they were sold to him?

[p. 61] A. Yes.

Q. Did the investigation address why they were sold to him by Parts Services?

A. The question was asked of Parts Services, and I don't really honestly remember the answer.

Q. You don't remember whether they addressed that or not?

MR. WALL: It's not what she said. She said she didn't remember the answer.

A. I don't remember the answer.

Q. Were you aware whether or not, other than the situation with Paul Hernandez, third-party service organizations had been able to receive from any source parts for Kodak Ektaprint copiers?

A. I don't know if they have received them from any source.

Q. Were you aware that they had parts with which to service Ektaprint copiers?

A. They would have to have parts if they were servicing Ektaprint copiers.

Q. So you were aware that they had parts with which to make service on Ektaprint copiers?

[p. 62] MR. WALL: That was your understanding, wasn't it?

A. I was aware that there were parts available for installation into those Ektaprint copiers.

Q. And from what sources were you aware they were available, other than purchased directly from Eastman Kodak company?

A. I don't know. The customers could have purchased the parts directly from us.

Q. Yes. I was asking for sources other than directly from Eastman Kodak Company?

A. I don't know.

Q. You don't know?

A. No.

Q. Was there any thoughts that were expressed at Kodak as to where these parts were coming from, other than directly from the Eastman Kodak Company?

A. Can I have the question read back?

(The reporter read back the pending question.)

A. From vendors that provide Kodak with parts.

[p. 63] Q. Okay. And what information did you have with regard to these parts coming from vendors who provide Kodak with parts?

A. That attempts had been made to purchase parts through vendors, and that if the parts are proprietary to Kodak, that the vendors refer the request back to Kodak. And if it's non-proprietary parts, that they will sell parts to anyone, I guess.

Q. And you had information that third-party servicers of Ektaprint copiers actually obtained these parts through these parts vendors?

A. No.

Q. You didn't have any information about instances where the vendors had actually supplied parts to third-party servicers of Ektaprint copiers?

A. Not to my knowledge.

Q. Now, were you aware at Kodak that there was a concern that third-party servicers of Ektaprint copiers were receiving parts?

A. From where?

Q. From sources other than directly from Kodak.

[p. 64] A. Could you read the question back?

(The reporter read back the pending question.)

A. I would like you to repeat the question.

Q. Was there a concern that third-party servicers were able to get parts other than directly through Kodak for Ektaprint copiers?

A. No.

Q. Kodak was not concerned about where they were getting parts?

MR. WALL: Outside of Kodak?

A. Outside of Kodak?

Q. Yes. Outside directly from Kodak.

A. No.

Q. You have to respond.

MR. WALL: She said no.

MR. HENNEFER: She was shaking her head.

MR. WALL: She said it while you were speaking.

THE WITNESS: I said it while you were speaking.

MR. HENNEFER: It wasn't audible, I couldn't hear it.

[p. 65] MR. WALL: I did.

A. Sorry.

Q. Were you aware of any steps that had been taken at CES before 1985 to prevent parts from being sold to third-party servicers of Ektaprint copiers?

MR. WALL: Could I have that read back, please?

(The reporter read back the pending question.)

A. No.

Q. Were any steps taken after 1985?

MR. WALL: Were any steps taken after 1985 to prevent them from getting Kodak parts?

MR. HENNEFER: Right.

MR. WALL: Through Kodak?

MR. HENNEFER: I will repeat the question. It came from the former question, but I'll have to repeat it every time.

Q. Were any steps taken after 1985 to try to prevent third-party servicers of Ektaprint copiers from obtaining parts from any source?

MR. WALL: Other than Kodak?

MR. HENNEFER: Any source, including [p. 66] Kodak or other sources.

A. No.

Q. Were you aware at any time while you were with CES of people expressing problems with third-party service of customer's Ektaprint copiers?

A. What do you mean by "problems"?

Q. Problems with quality or response time or cost of service rendered by third-party servicers to Ektaprint copiers?

A. Yes.

Q. What problems were you aware of?

A. In general conversation with people in CES in the field on the West Coast, there were mention of customers that were just coming back to Kodak for service, in general. I don't have any specifics for you. But in general conversations, people that were not totally satisfied with service that they received from outside of Kodak.

Q. Do you remember the reasons why they expressed dissatisfaction with third-party service of Ektaprint copiers?

A. No.

Q. Do you recall any complaints with regard [p. 67] to the quality of the training of technicians used by third-party servicers regarding Ektaprint copiers?

A. No.

Q. With regard to parts suppliers for Ektaprint copiers, do you recall any pressure on parts suppliers by Kodak not to sell parts to third-party servicers for Ektaprint copiers?

A. No.

Q. Were you involved in any way with the setting of levels of inventory for Ektaprint copier parts at CES?

A. No.

Q. Were you involved in any discussions regarding the pricing of copier parts for Ektaprint copiers in CES?

A. Could you repeat the question?

(The reporter read back the pending question.)

A. Yes.

Q. What aspects of the pricing were you involved in discussions on?

A. General discussions about price increases and price decreases and just historical

* * *

[p. 71] don't have any knowledge."

THE WITNESS: Please, repeat the question.

(The reporter read back the pending question.)

A. A few service modules have been sold.

Q. Are you aware of the circumstances under which those were sold?

A. I wasn't involved in the sale of the service modules.

Q. Are you aware from other sources how those service modules were sold and why?

A. I don't recall the details around the selling of those service modules.

Q. Okay. Can self-servicers buy parts for Ektaprint photocopy machines to be installed by a third-party service organization?

A. Can you repeat the question?

(The reporter read back the pending question.)

A. A customer who is servicing their own equipment can buy parts from Kodak, period.

Q. And when you say "period," you mean, don't you, that they have to put them in their own [p. 72] machine?

A. Yes.

Q. But they can be put into their machine by a third party; is that correct?

MR. WALL: You are asking as a matter of policy?

MR. HENNEFER: Yes, right.

MR. WALL: He's not asking you whether -

MR. ROMEYN: It's theoretically possible.

MR. WALL: - it's theoretically possible. Whether as a matter of policy Kodak will sell to a customer so that they may have an independent service organization service that customer's machine.

A. Well, that's not consistent with self-servicing.

Q. Is that what Kodak's policy is?

A. I would like some clarification on the question.

Q. I think your counsel stated it well, and the question is this.

Is it Kodak's policy to allow sale of [p. 73] parts to self-servicers where those parts, to the knowledge of Kodak, will be put into the Ektaprint copier by a third-party service organization?

A. I'm not aware of such a policy.

Q. Is it Kodak's policy that parts cannot be sold to self-servicers where those parts will be put into an Ektaprint copier by a third-party service organization?

A. No.

Q. There is no policy on that one way or the other, that you're aware of?

A. This is confusing. I guess I don't understand -

MR. WALL: Counsel, I think it would help. What you are really asking is about an application of the replacement parts policy to a particular situation. But I think the witness is being confused because you are asking her whether there is a policy that has been set for that situation.

MR. HENNEFER: I am asking whether a policy applies to this situation. And, you know, if you want to get into a semantic game of whether the policy applies or the policy states it [p. 74] directly or indirectly or whether it implies or can be inferred from -

MR. WALL: I don't view that as a semantic difference at all. You may, but it's causing some confusion. It's your deposition, you can clear the confusion very easily.

MR. HENNEFER: I don't believe the confusion is in the question but I'll restate it differently if it will help.

Q. Are you aware of any policy that either addresses directly or that by implication says that self-servicers can or cannot buy parts to be installed in their Ektaprint copier by a third-party service organization?

A. No.

Q. Okay. Are you aware of any self-servicers, that is people who have bought Ektaprint copiers directly from Kodak?

MR. WALL: Direct customers.

MR. HENNEFER: Right, you call them direct customers.

Q. Are you aware of any -

MR. WALL: It may be different than the previous question. But he'll ask this one.

[p. 75] MR. HENNEFER: Okay, strike that.

Q. Are you aware of any direct customers for Ektaprint copiers who are buying parts for Ektaprint copiers from Kodak and reselling those parts to others?

A. No.

Q. Does Kodak have a policy that addresses what would happen if somebody did that?

A. Yes.

Q. What is that policy?

A. We wouldn't sell them parts.

Q. They would be terminated from being able to buy parts; is that correct?

A. Because we don't resell -

Q. Allow reselling?

A. Allow reselling of parts. We sell them directly to our Copy Products customers.

Q. Yes, right. Has that ever occurred -

A. Not that I know.

Q. -to your knowledge?

A. Not that I know.

Q. Have you heard discussed or discussed with anyone at Kodak whether or not Kodak's policy to not sell parts for Ektaprint copiers to [p. 76] third-party servicers would affect the cost of service, whether from Kodak to third-party - or third-party servicers to owners of Ektaprint copiers?

MR. WALL: Could I ask that be read back?

(The reporter read back the pending question.)

MR. WALL: There's something in that question about service to Kodak third parties.

MR. HENNEFER: Kodak or third parties is I believe what I said, from Kodak or third parties, service from Kodak -

MR. WALL: Could you just simplify it and try it again?

Q. Have you ever heard discussed that the failure to sell parts to third-party service companies for Ektaprint copiers would prevent competition and lower prices in service?

A. No.

Q. Have you ever heard discussed whether the lack of competition for service of Ektaprint copiers would result in lower values of used machines?

* * *

[p. 79] A. Generally through discussions with sales reps, but that's how you would know.

Q. Okay. Did Kodak keep track of what specific models of Ektaprint photocopiers were owned by the direct purchasers that they identified?

A. Yes.

Q. And did they match up the models, if possible, with the parts that were being ordered for those copiers?

MR. WALL: On a routine basis?

MR. HENNEFER: Yes.

A. No.

Q. So, if I had a 150AF that I had purchased directly from Kodak, could I order a part that was exclusive and unique to a 300?

MR. WALL: Again, you are talking now on a broad policy level.

MR. HENNEFER: Yes, policy or practice.

A. Most likely.

Q. When you say "most likely," what do you mean by that?

A. I don't have any knowledge that you would not be able to buy that part.

* * *

[p. 93] another customer.

Q. Had that always been the case?

A. To my knowledge.

Q. If it were sold to another customer, had Kodak been servicing those pieces of equipment?

A. In what time frame?

Q. From the time you were with CES on?

A. To my knowledge, yes.

Q. Did the availability of third-party service make it easier for customers to sell used equipment and get that equipment serviced without having to come back to Kodak and go through an inspection and certification or remanufacturing process?

Do you want to have her read that back?

MR. WALL: Please do so.

(The reporter read back the pending question.)

A. I don't know what the ISOs' policies were, so I can only speak for our practices.

Q. Okay. In the letter of October 5, 1985, you state that "This letter is to familiarize you with our current business practices." Why did you refer to these as the current business practices? [p. 94] Had they changed?

A. In what letter?

MR. WALL: August 5.

THE WITNESS: He didn't say August.

MR. HENNEFER: I believe I said August 5, 1985.

A. You said -

MR. WALL: In any event, this is it.

A. That's just the way I write. Current business practice is the way I chose to -

Q. Refer to it?

A. Refer to it.

Q. You weren't distinguishing them from past business practices or business policies?

A. No.

Q. In the fourth paragraph of the August 5, 1985 letter, you refer to Kodak's desire to offer EMAs even though Kodak has no obligation to service the copiers.

Do you know why Kodak chose to offer service to brokered Ektaprint copiers as opposed to not offering any service at all?

A. We wanted the service revenue.

[p. 95] Q. Were there any other reasons you were aware of?

A. No.

Q. With regard to the fifth paragraph in the August 5, 1985 letter, in the second sentence you say, "The current business practice of Copy Products is to make all necessary parts, tools, training and service literature available at established prices to direct Copy Products customers of Kodak who want to service their own copiers."

Again, when you are saying current business practices, that's just your way of writing?

A. Yes.

Q. It doesn't in any way reflect that the practice may not have been the same in the past?

A. No.

Q. And you have underlined their own copiers to put emphasis on that. Is that to distinguish it from any customer who might want to service a copier of others, be a third-party copier servicer?

A. Yes.

[p. 96] Q. Also to underline the fact that self-servicers shouldn't sell those parts?

A. That wasn't the idea at the time, that I can recall. I just wanted to point out to the field that if they wanted to service their own copiers, we would sell them parts.

Q. On page 2 of the August 5, 1985 letter, you say, "It is important that we be consistent in our communications and implementation of the attached guidelines."

Why do you stress that it's important that you have consistency? Was that because there was some inconsistency in the past?

A. No.

Q. You are aware of no inconsistencies?

A. Not that I can recall.

Q. When you say "implementation of the attached guidelines" in that first sentence of the second page of the August 5, 1985 letter, do you mean to imply that they were being implemented for the first time?

A. It doesn't say that.

Q. No, it doesn't say that. But what I'm asking you, are you implying that these guidelines [p. 97] are being implemented for the first time, that there were no prior guidelines?

A. I don't believe there were prior guidelines in writing.

Q. This is the first time somebody had sat down, to your knowledge, and set out the guidelines in these areas; is that correct?

MR. WALL: In writing.

MR. HENNEFER: Yes.

A. Yes.

Q. Had they been set out verbally before?

A. I don't know.

Q. To your knowledge, had they?

MR. ROMEYN: Off the record, Jim.

(There was a discussion off the record.)

MR. WALL: Let's get the question straight. When you are saying "had the guidelines," are you referring to the entire guidelines that cover two different subjects or any portion thereof?

MR. HENNEFER: I'll ask the question.

Q. To your knowledge, prior to 1985, had the guidelines that you are promulgating by the August 5, 1985 letter, with regard to broker sold [p. 98] equipment and third-party service organizations, been set out to the field to be implemented verbally?

MR. WALL: Do you understand the question?

THE WITNESS: No. There's two separate issues and that's what - I don't know what he's getting at.

MR. WALL: Counsel, maybe you could break it down.

MR. HENNEFER: I will.

Q. Had the guidelines that you were putting out with this August 5, 1985 letter, with regard to broker sold equipment, been put out to the field for implementation verbally prior to August 5, 1985?

A. I don't know.

Q. Had you done so?

MR. WALL: Again, I have to ask you to clarify one thing. Are you excluding from this conversations she may have had with individual field representatives and limiting it to some sort of a broader policy?

MR. HENNEFER: Either way, whether she [p. 99] did it with several separately or whether she did it to all of them in one large convention of Kodak reps.

MR. WALL: Under your construction of the question, if she had a single conversation with a single field person, that would be a yes answer. Okay.

MR. HENNEFER: Let me break it down. I will ask a series of questions, if one will not suffice.

MR. WALL: Which apparently won't, no.

Q. Prior to August 5, 1985, had you discussed with various field representatives around the country what the guidelines were to be with regard to what you term "broker sold equipment"?

A. I had conversations with people about the subject before this letter was issued.

Q. Were those conversations based upon guidelines that had already been set up, or were you, if you will, searching to set up what the guidelines should be?

A. We are talking about the way to handle broker sold equipment.

[p. 100] Q. Service to broker sold equipment. When I say "broker sold equipment," I'm referring to the category in this letter that is so entitled, and I mean service to broker sold equipment.

A. That's right.

Q. Do you want the question read back?

A. Yes.

(The reporter read back the pending question.)

A. From what I can recall, we talked about the way to handle it, not how to handle it - not asking them, soliciting them for information on how to handle it. We were talking about this is the way you handle a piece of equipment.

Q. What I'm trying to ask you is with regard to servicing of broker sold equipment prior to the August 5, 1985 letter, did you have fixed in you mind a set of guidelines or -

MR. WALL: Maybe we can get away from the word "guidelines." Did she have a policy in mind to follow.

Q. Were you following a specific policy that included in that policy what you set out after the August 5, 1985 letter as specific [p. 101] guidelines or were these something new?

A. These were something new.

MR. HENNEFER: Do you want to take a lunch break and come back after lunch? We are at 12:30.

MR. WALL: 1:30?

MR. HENNEFER: 1:30 is fine.

(The proceeding recessed at 12:32 p.m.)

(The proceeding reconvened at 1:35 p.m.; appearances as before noted.)

LYNN M. GLEASON, resumes:

DIRECT EXAMINATION BY MR. HENNEFER CONTINUING:

(The reporter read back the last question and answer.)

Q. With regard to the guidelines that were set out in connection with the August 5, 1985 letter regarding third-party service organizations and parts, were there prior written or oral guidelines or were these new guidelines that were being set out?

MR. WALL: I believe that's asked and answered.

MR. HENNEFER: No. The previous

* * *

[p. 108] A. That's correct.

Q. And what other information is on there, besides the customer's name, the type of equipment, whether he's on an EMA or per call?

A. The service history on the equipment.

Q. Okay. Is there any other information?

A. I'm sure there is some information in addition to that. But those are the pertinent things that are maintained.

Q. In the guidelines at paragraph 6 it makes reference to a flat rate pre-installation inspection fee. Do you know how the amount of that flat rate pre-installation inspection fee was determined? And for your reference, I think there's a schedule of them three pages back; is that correct?

A. Yes.

Q. Okay. Do you know how that was determined, on what basis?

MR. WALL: How particular fees were determined?

Q. Yes, exactly, that schedule or the fees.

A. Yes.

[p. 109] Q. How was that?

A. There was an estimate of how much time it would take to actually inspect a certain model of equipment. And that amount of time was multiplied by the burden hourly rate that we actually established for our field engineers. And we simply multiplied the two and came out with a fee per configuration.

Q. Did these fees initially set in October of 1985 -

MR. ROMEYN: August.

A. That's the second time.

Q. I am sorry. - August, 1985, turn out to be accurate or were they subsequently revised?

MR. WALL: Turn out to be accurate? What do you mean by that?

MR. HENNEFER: In terms of an estimate of what it would cost.

MR. WALL: Were they an accurate estimate?

MR. HENNEFER: Yes.

MR. WALL: The question is whether they were an accurate estimate of what it would cost to inspect these various types of machines.

[p. 110] A. I don't know.

Q. When you say you don't know, you don't know whether this actually stood up under the test of time to what you had estimated it would cost for labor, travel time, the cost of a starter kit? And when I say labor, travel time and the cost of a starter kit, I'm reading from the sixth paragraph there.

A. Could you read the question back?

(The reporter read back the pending question.)

A. That's correct.

Q. Were these subsequently revised?

A. Yes.

Q. And how many times were they revised from August of 1985 until you left CESD, which was this year, 1987?

A. I think once.

Q. Okay. And do you remember when that was?

A. Not specifically.

Q. Was it in 1987?

A. I don't think so.

Q. You think it was in 1986?

[p. 111] A. Yes.

Q. And do you recall how they were revised?

A. They were increased.

Q. Were they increased for every model or were they increased to a flat rate for all models?

A. They were increased to give a flat rate for mid volume equipment, a flat rate for high volume equipment and a flat rate for duplicator equipment.

Q. When you say for mid volume equipment, what models are you including in mid volume equipment?

A. 85 and IM40.

Q. And for high range?

A. 100, 150, 200, 225, 235.

Q. And when you say duplicator, you are referring to?

A. 250 and 300.

Q. What is the distinction between a copier-duplicator and a duplicator, if there is one?

A. Just the volume of equipment that it's expected to - the volume of copies that it's expected to put out on a monthly basis. It's just [p. 112] a differentiation in market segment.

Q. So there's a differentiation in as you refer to the market segment - standing objection - between the high volume which you call a copier-duplicator, is that correct, and the duplicator?

MR. WALL: For purposes of using that term within Kodak?

MR. HENNEFER: Right.

MR. ROMEYN: I lost the question.

MR. WALL: He's asking you whether Kodak's usage of duplicator versus copier-duplicator is distinguished based upon the volume of copies that a machine makes.

A. That's correct.

Q. And the only thing that qualifies as a duplicator because of its very high volume is the 250 and 300?

A. That's correct.

Q. And that is common parlance in Kodak, is it?

A. Yes.

Q. That's what people say?

A. Yes.

[p. 113] MR. WALL: It's not exactly made into a trade name or a protected name.

MR. ROMEYN: It's not protected. Off the record.

(There was a discussion off the record.)

Q. Do you recall what the increases in the flat rate pre-installation inspection fee were raised to for mid range copier-duplicators and duplicators?

MR. WALL: What the fees were raised to?

MR. HENNEFER: Yes.

A. Not specifically. I have a ballpark but not specifically.

Q. What is your ballpark, ROM?

A. \$1,000 for mid volume, 1,500 for copier-duplicators, and 2,000 for duplicators.

Q. So for a pre-installation inspection fee for a Kodak Ektaprint 100, 150 copier-duplicator, the fee was raised from \$250 to \$1,500; is that correct?

A. That's correct.

Q. And the pre-installation inspection fee for a Kodak Ektaprint 250F duplicator, the fee was [p. 114] raised from \$640 to \$2,000; is that correct?

A. It's not correct.

Q. 250F was from 515 to 2,000; is that correct?

A. That's correct.

Q. Why were the raises so substantial?

A. There was a decision made to increase the pre-installation inspection fee because we weren't recovering what it cost us to have a new customer of Kodak's inspected and established as a new customer.

Q. And you were falling that short, that is the difference between what you were charging and what the new charges were going to be, in your estimation?

A. Yes.

Q. What were the costs associated with the pre-installation inspection besides the ones that are listed in the guidelines in paragraph 6, that is labor, travel time and the cost of the starter kit? Were there parts?

A. Field engineers would in most situations find the need to install an image loop, which is our photoconductor.

[p. 115] Q. Is that not included in a starter kit?

A. I don't know.

Q. What is in a starter kit, if you know?

A. Paper, toner, developer, plastic bags, twist ties.

MR. ROMEYN: You asked.

Q. Is there a photoconductor loop?

A. I don't know.

Q. There may be, but you don't know?

A. I don't know.

Q. Okay. What other items that were parts would be installed in a pre-installation inspection fee? Because it was my understanding, maybe this is incorrect, that they didn't install parts during that.

A. What we instructed the field engineers to do as part of the pre-installation inspection fee if they felt it

was necessary was to either install an image loop and/or a fuser roller, which is a part.

Q. What are the approximate costs of an image loop, or the price at which you would sell an image loop or a fuser roller on a per call basis?

[p. 116] A. An image loop is over \$100 and less than 200. I don't have a total.

Q. Okay.

A. And from what I can remember, at the time the fuser rollers were over \$500 on a per call basis.

Q. Do you know what Kodak's costs on those items was?

A. No, I do not.

Q. Okay. What other parts might be installed in connection with a pre-installation inspection?

A. None, to my knowledge.

Q. Did you find that the fees of 1,000, 1,500 and 2,000 covered the costs that you described or potential costs for labor, travel time, cost of the starter kit and the two specific items of parts that might be installed?

A. No.

Q. It still didn't cover it, was that your experience?

MR. WALL: The question was did she find that?

MR. HENNEFER: Yes.

* * *

[p. 155] just a copy, it says "from Lynn M. Gleason" though?

A. That's correct.

Q. But the initial introductory lines here on the January 30th indicates that it had been sent out as just a copy to -

A. Some field CES people.

Q. Oh, okay. Do you know whether this was the practice, whether this letter that you sent out on January 27, 1987, was subsequently disseminated to the field?

A. That looks as though it was.

MR. WALL: May I see this, please? I just want to look at the dates.

MR. HENNEFER: It's January 30, 1987. It says it's filed 1987-01-30. I was wondering when the pen would drop.

Q. Okay. I would like to ask you a few questions about the January 27, 1987 letter, okay?

The second paragraph of your letter of January 27, 1987, it says "First off, a few reminders on our overall business strategy."

When you say "overall business [p. 156] strategy," who determined what the overall business strategy was in this context?

A. Copy Products management determines business strategies.

Q. So the business strategy put in here was put out by Copy Products management; is that correct?

A. That's correct.

Q. It says at the end of that second paragraph that "Our objective is to continue to provide EMAs on these units and to charge appropriately for the administrative service and support costs involved in handling third-party equipment."

Now, was that objective what you had in mind when the inspection fee was raised in the next paragraph under item 3 to \$1,000 for MV copiers, 1,500 for copiers-duplicators and 2,000 for duplicators?

A. Yes.

Q. In item number 2 in the next paragraph it says that "Kodak will perform a pre-installation inspection for ALL" - and all is all in caps - "third-party equipment regardless [p. 157] of the equipment class to determine if it meets Kodak's standards." Was that a change from the prior policy?

A. Yes.

Q. Okay. What had the prior policy been?

A. It had been to perform a pre-installation inspection on the equipment that was going to be covered by an EMA.

Q. Only. And this was instituting it with regard to all equipment, including equipment that was going to be on a per call?

A. That's correct.

Q. And we have discussed item 3, that is correct, where the inspection fee is charged at 1,000, 1,500 and

2,000 directly to the prospective customer and not to a third-party broker?

MR. WALL: We discussed that fee earlier. We didn't discuss the statement in this document.

Q. What is meant by the statement in the document that "The pre-installation inspection fee should be charged directly to the prospective customer, not to the third party"; was that a change in policy?

[p. 158] A. No.

Q. The change in item 3 was in the pre-inspection fee amounts, wasn't it?

A. That's correct.

Q. In paragraph 4 it says in the first line, "If the copier is found to meet Kodak standards, an EMA or service on a per call basis will be offered at current prices."

The change there is that the service on a per call basis will also be offered; is that correct?

A. That's not a change. That first sentence is not a change.

Q. After the copier was found to meet Kodak standards, would you offer an EMA or a per call service on that machine prior to this time, January, 1987?

A. Could you reread the question for me, please?

(The reporter read back the pending question.)

A. The change was whether we were going to charge a pre-installation inspection fee for per call equipment, not whether we would service that [p. 159] unit at current prices.

Q. Per call. What you are saying is you didn't - the prior policy, as I understand it, you did not charge a pre-installation inspection fee if it was going on per call. You were now going to do so; is that correct?

A. That's correct.

MR. WALL: Want to take a break?

MR. HENNEFER: Sure.

(The proceeding recessed at 3:25 p.m.)

(The proceeding reconvened at 3:38 p.m.; appearances as before noted.)

LYNN M. GLEASON, resumes:

DIRECT EXAMINATION BY MR. HENNEFER CONTINUING:

Q. Looking at the letter of January 27, 1987, in the paragraph that begins "If you discover," do you see that?

A. Yes.

Q. At the end of that it says, "If CES determines that remanufacturing is necessary, the customer still has the option to convert to per call without having the unit remanufactured."

Was that a new option?

* * *

EXHIBIT J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

_____x	
IMAGE TECHNICAL SERVICES,	:
INC., et al.,	:
Plaintiffs,	:
- against -	:
EASTMAN KODAK COMPANY,	:
Defendant.	:
_____x	

No. C87
1686 WWS

DEPOSITION UPON ORAL EXAMINATION OF:
John A. Lacy

LOCATION: Rochester Plaza
70 State Street
Rochester, New York 14614

DATE: January 11, 1988

TIME: 12:06 p.m.

REPORTED BY: MARIA A. WOLCZYK, CSR, RPR
Alliance Shorthand Reporters, Inc.
Suite 1004, Alliance Building
183 Main Street East
Rochester, New York 14604

* * *

[p. 15] JOHN A. LACY - DX BY MR. HENNEFER an
independent service bureau.

Q. And how would that differ from the DDMS as
you have described it?

A. I am afraid I just don't recall. I am sorry, I can't
help you there.

Q. Okay. With regard to some or all of the various
categories we have reviewed, were there separate and
discrete marketing strategies that you worked on or
developed, either at BSMD or its successor, BISD?

A. We are in 1985 now?

Q. Yes. Well, during your tenure in either one of
those, which I believe started in '79.

MR. PICKETT: The question is whether there's
a separate marketing strategy for each or some of these
particular categories.

MR. HENNEFER: That's correct, yes.

A. Well, yes and no. These are all interrelated prod-
ucts. When you're selling, for instance, a system, if you
want to take that category, it is highly likely that there
could be products from every one of these areas included
in that system. So, while in some cases there could be a
stand-alone product strategy for one of them, [p. 16] for
instance if you just upgraded a reader/printer or a micro-
filmer, you could have an independent sale. But very
often, all of them are included in one sale.

So, while we do have groups that work with each one
of these areas, they are all definitely closely interrelated.

Q. When you earlier described sales, you spoke
about a higher return on sales for cost of the program, or
words to that effect.

Did you monitor that with regard to any of these
specific categories?

MR. PICKETT: Category by category?

MR. HENNEFER: Yes, right.

A. We monitor sales in each category. We don't - we obviously know what our cost of sales is. But we do not and have not differentiated the specific costs as they might vary for each one of these areas because of the reasons that I talked about. Because of the interaction between the products, it's very difficult to assign a cost to each one of them. So therefore, we use a general cost for our whole division in selling cost and don't differentiate it between products.

. . .

[p. 27] I wouldn't say that that was directly a major cause for the change, but it certainly was a concern of ours.

Q. And was there specific discussion in connection with the April, 1985 BISD policy change on what types of sophisticated equipment could not be adequately serviced by ISOs?

A. Well, as you know, when we put the policy in, we, if you will, grandfathered some of the earlier equipment which was, in many cases, some of the less sophisticated equipment in terms of parts policy. But a lot of the equipment that was coming out in the future was and is quite sophisticated.

Q. Specifically why would the Reliant 1000 be the cutoff point, do you know?

A. That was just a point in time.

Q. And it was felt that the equipment prior to that time was not too sophisticated for ISOs to service; is that correct?

A. No.

Q. But parts were still going to be sold -

A. My answer "no" is I'm not agreeing with [p. 28] your comment, not "no" answering your question.

Q. It was felt then that there was or was not equipment prior to the Reliant 1000, in let's say other areas in retrieval devices or in other systems, that could be handled by ISOs?

A. We didn't sit down and attempt to differentiate which equipment was too sophisticated and which one wasn't. I don't recall us ever sitting down and trying to identify from that point.

Q. It was just a temporal thing?

A. I don't know what that means.

Q. From a time standpoint forward, any equipment that came out was going to be subject to -

A. The cutoff point was time, yes.

Q. You listed as one other factor that you felt would, if you will, debilitate an ISO from giving the quality of service that you wished as training; is that correct, lack of training?

MR. PICKETT: Could you read that back, please?

(The reporter read back the pending question.)

* * *

[p. 32] was was I involved in discussions?

Q. Right.

A. And the answer is no.

Q. The second part of that question would be whether you discussed the possibility that training would be made available to ISOs to update their knowledge for servicing micrographics equipment?

A. Not that I'm aware of.

Q. In your Declaration you list as some of the major competitors of Kodak in the micrographics area Bell & Howell, 3M, Minolta, Canon and Fuji.

Are you aware of what policies these companies have adopted toward the sale of replacement parts?

A. Not specifically, no.

Q. Are you generally aware of any of them?

A. No.

Q. Do you know whether the parts policies of competitors, the ones I've listed: Bell & Howell, 3M, Minolta, Canon and Fuji, were considered in the development of Eastman Kodak's parts policy for micrographics replacements parts [p. 33] in April of 1985 or thereafter?

A. I am not specifically aware of that, no.

Q. Are you aware of what the policies with regard to servicing used machines are for those competitors, Bell & Howell, 3M, Minolta, Canon, Fuji?

A. I am not.

Q. Are you aware with regard to those five listed micrographics competitors of Kodak what their policies are for taking trade-ins of Kodak machines and their equipment?

A. No. I know they take trade-ins, but I'm not aware of their policy and terms.

Q. From your position as the marketing manager at BISD, has it been a consideration in your sales policies what the trade-ins of competitors is for Kodak machines?

A. I am sure that our marketing people look at the trade-in policies in terms of pricing in terms of other vendors. Obviously we are in a highly competitive marketplace and you need to have policies that are consistent with what's accepted in the marketplace.

I personally was not involved in [p. 34] understanding those.

Q. When you say it has to be consistent with the marketplace, what do you mean by that?

A. Well, if everybody is selling a \$5,000 automobile and you are going to come to market with a \$15,000 automobile that does the same things, you are probably not going to be very successful. That's what I mean.

Q. With regard to trade-in policies, how does that relate?

A. You certainly would want to understand what your competitors were doing in any marketplace. And while you may not necessarily follow what they are

doing, you ought to, I think in any business you need to understand what competitive practices are, to know how to sell against that and understand what you might perhaps want to do.

Q. What are Kodak's practices with regard to accepting micrographics machines of its major competitors, including the five that I've listed, as a trade-in on Kodak machines?

A. We offer modest trade-ins on both Kodak equipment and competitive equipment for like [p. 35] models. In other words, we will take a reader/printer in trade, either ours or a competitor's, for sale of a new reader/printer.

Q. But on like models, you wouldn't take a reader/printer in as a trade-in on a COM system or CAR system?

A. No, to the best of my knowledge we don't do that.

Q. And how are the prices established at which you take trade-ins of either - let's start with Kodak equipment for a new piece of Kodak micrographics equipment?

A. Okay. First we have a - we split it in two for current equipment, that is products that we are currently selling in the marketplace.

Q. Okay.

A. And noncurrent. That is obsolete products. And the trade-in would normally be higher for a current product than it would for a discontinued product.

Q. And how are the levels of those set? Are they set with regard to what those products would fetch in the open market?

A. Well, wait a minute, I want to make sure [p. 36] I understand your question.

Q. Do you want to read it back, or I'll restate it.

A. I would rather have you restate it.

Q. What I'm asking you is how are the prices set at which Kodak will establish a trade-in value for -

A. How do we set a trade-in price?

Q. Yes.

A. Well, like any pricing, a number of factors would be considered. We obviously would want to look at the margin on those products and understand how much margin we would be giving up so we knew that we were still selling those products at a profitable price. So, profit is a strong motivator.

And then again as we have talked about earlier, market conditions, what is judged to be acceptable in the marketplace.

We might also evaluate our current sales position with a particular product. So there could be a number of factors.

Q. When you say you would look at the margin, the profit, what do you mean by that? Can

* * *

[p. 44] MR. PICKETT: New as of when?

MR. HENNEFER: As of the last five years.

MR. PICKETT: Let me go back and have you read the question, please. I think we are getting to markets and after-markets in a sense that may be confusing.

(The reporter read back the pending question.)

Q. From your knowledge of the used micrographics equipment market over the past five years, has there been a substantial increase in the number of these machines available in that market?

A. I would say there has been an increase. I don't know how to quantify substantial.

Q. Was this something that was a common occurrence, the selling of used equipment, in fairly substantial volumes in the 1970's?

A. I would say no. Substantial volumes - again, I don't know substantial. But if you mean is it half the market, the answer is no.

Q. Right. Does BISD or has Kodak estimated what the number of these machines in terms of [p. 45] percentage of market or in raw numbers is?

A. Not that I'm aware of.

Q. In regard to the servicing of used machines, did BISD ever track the number of either EMAs or per call servicing contracts or calls it had on used equipment as opposed to equipment it sold and that had not been resold?

A. I don't understand the question.

Q. Did - I'll restate it.

Did BISD ever attempt to track, prior to 1985, whether the equipment it was servicing was equipment it had sold itself directly to a customer or was a piece of used equipment?

A. Not that I'm aware of.

MR. PICKETT: By "used" you really mean resold?

MR. HENNEFER: Right.

Q. Is that what you understood?

A. Yes.

Q. The attempt has been made since 1985; is that correct, to try to track some of - to track whether the equipment being serviced under an EMA was equipment that had been resold or was bought directly from Kodak; is that correct?

* * *

[p. 83] A. I don't understand the question.

Q. How does that affect his decisions to buy new equipment or to keep the equipment he's got?

A. A current user of Kodak product, the question, as I understand it, how does he consider the price of a Kodak service agreement when he considers replacing the product?

Q. Yes. Or whether he should replace the product.

A. Well, of course, sure. The price of service is going to be important to him as he makes a decision for what his next product is going to be.

Q. Has it been your experience that increases in the cost of Kodak's EMA for any of its equipment has resulted in people changing in an abnormally large number from Kodak machines or trading in equipment?

A. Your question is has there been a mass exodus away from Kodak products because of increases in service?

Q. Yes, or even a perceptible one that you have experienced at BSMD or BIS.

[p. 84] A. Not that I'm aware of.

Q. Do you have any order of magnitude on the increase in the cost of an EMA for a particular machine over the past five or ten years? For example, on a Starview, what is a standard EMA in 1980, '85, '88?

A. I don't have firsthand knowledge of that.

Q. Do you have a rough order of magnitude on how much that has increased over the years?

A. On a specific piece of equipment, the answer is no.

Q. Generally on all of the equipment?

A. Well, we watch the price of our service agreements very carefully. We don't abruptly normally raise prices on it unless for some reason there has been some shift in cost in servicing that product. But we obviously again, like all our products, are very careful about price

increases and making sure we don't dramatically increase price.

Q. Have there been price increases for service of any products that you are aware of in BISD, BSMD?

* * *

[p. 109] Q. Whether you see those reports or not, do you know if it occurs? Is it a part of your overall profitability?

A. Is profitability on parts part of our overall profitability?

Q. Yes.

A. Again, I hesitate to answer because I'm getting into an area that I'm really not involved in.

Q. You don't know, is what you are saying?

A. I don't know. I don't know the systems there. (There was a pause in the proceeding.)

Q. Does BISD track how frequent other brands of micrographic equipment are traded into Kodak for people switching to Kodak?

A. Track, keep records?

Q. Yes.

A. No, not that I'm aware of.

Q. Does Kodak track, in the sense of the quality and amounts, the trade-in policies of other manufacturers for Kodak equipment?

A. Again, track it on an ongoing basis to keep records of what they trade?

[p. 110] Q. Yes.

A. Not that I'm aware of.

Q. Do they track it from a competitive intelligence standpoint so that they know what other people are offering for Kodak machines on trade-in?

A. I don't have specific information. Our Business Research people could be doing that, but I'm not aware of it.

Q. Do you know whether other competitors of yours in the Micrographics area have attractive trade-in policies for Kodak equipment?

A. Do I personally?

Q. Yes.

A. No. I don't know what their personal policies are. Again, as I indicated before, we obviously have an ongoing monitoring of knowing what's taking place in the marketplace. But I personally don't have knowledge of that.

Q. So you don't know whether those are attractive or not, or how many of them are being taken advantage of by Kodak machine owners?

A. I don't.

Q. Are you aware of what other machine [p. 111] manufacturers or competitors do when they take a Kodak machine as a trade-in with that machine?

A. I have no knowledge of that.

Q. Does Kodak track beyond the top 15 customers that we saw a chart on earlier what percentage of their sales are to say their top 100 or 200 or 300 customers?

A. You mean with BIS, do you mean?

Q. Yes.

A. No. we may look at it on a - you know, on a specific basis if we have reason at one point in time. But when you say "track," I assume you mean an ongoing reporting system. The answer is no.

Q. Is there more emphasis on larger customers or smaller customers in the Micrographics area? What I'm trying to say, is the sales emphasis, marketing emphasis that you are aware of toward the larger customers in Micrographics or toward the smaller, more diversified product or customer base?

A. We try to emphasis all aspects of our product line. There's no point in having them in the product line. So there's a broad - we have. . . .

* * *

[p. 118] Kodak supplies or service?

A. Either in sales brochures do we make - I am not specifically aware of the wording in the brochures.

Q. Would you take a look at Exhibit 1 to the Gross Declaration, which is a memorandum of April 12, 1985. It's document number 1284 through 1286.

MR. PICKETT: You don't have it there. This is a different Declaration.

THE WITNESS: Are you going to get it?

MR. PICKETT: Somewhere I do.

MR. HENNEFER: Sorry, I have it in my stuff coming.

MR. ROMEYN: Off the record.

(There was a discussion off the record.)

MR. HENNEFER: Would you review that, please?

(There was a pause in the proceeding.)

Q. You were a co-author of this document; is that correct?

A. That's correct.

Q. Where did the impetus, if you will, for this document come from?

[p. 119] A. The impetus.

Q. For the writing of this document.

A. The impetus for writing the document flowed out of comments that we have made earlier in Declarations and elsewhere that we were concerned about our return on assets and the rather sizable parts inventory that we had. And we wanted to implement measures to reduce the size of that parts inventory and therefore get a better return on our assets.

Also, we didn't see why we should be in business to inventory parts for competitors of ours. And that's exactly what we were doing. The policy was originally - the previous policy had been directed, if you will, all towards direct users, which it was originally put in for. And then again with the change in circumstances, we had to re-evaluate that policy.

Q. When you say the previous policy was directed at direct users, what do you mean by that?

A. Well, earlier in our history, this - we had direct customers and the parts were going to our ESRs to support our direct customers. And [p. 120] that's what the whole system was put in for.

Then as the market changed, we had to re-evaluate our policies and programs.

Q. When you say as the market changed, what do you mean by that?

A. Others began to service Kodak equipment, it became obvious that we were inventorying parts for them as well. And there's no reason as business people we should inventory parts for others. We have those parts for our own direct customers.

Q. So this was a decision out of BISD; is that right, a marketing decision to increase the return on assets and to implement a parts policy that was not to inventory parts for others?

A. It was a Kodak policy to improve our return on assets which was implemented in all divisions. Each division looked at their own way to implement that policy, and this is a joint CES/BIS policy that we implemented.

Q. Why was it a joint CESD policy to improve return on assets? Were they required under the new Kodak policy of 1985 -

MR. PICKETT: Go ahead. He's asking two

* * *

[p. 124] to determine that certain types of used equipment might be exempt? For example, equipment that was being serviced prior to its being sold as used equipment to a new owner under an EMA?

A. I can't tell you in the deliberations on how it might be done what all the considerations were.

Q. Was there any consideration in developing the used equipment service policy, which I'm referring to as the policy addressed in paragraph 1 -

A. Number 1, yes.

Q. - as to what effect used equipment was having on new equipment sales?

A. I think they are two separate issues.

Q. When you say they are two separate issues, what do you mean by that?

A. Well, used equipment in the marketplace, if that's sold, obviously has an effect on new equipment sales and that's something you are concerned about.

This was driven by our getting committed to service on what might be equipment that hadn't been well maintained and had an exorbitant cost [p. 125] for that product, and we would lose money on it. So again, having to get involved in making a commitment to service on something we didn't know anything about.

Q. Why wasn't this dealt with on a per call basis? To put the equipment on a per call basis, wouldn't that have accounted for any unexpected cost?

MR. PICKETT: You mean don't offer EMA, simply offer per call?

MR. HENNEFER: Right.

MR. PICKETT: Rather than offer EMA after inspection?

MR. HENNEFER: Right. I'm asking why it wasn't dealt with on that basis?

A. I'm not saying it wasn't. Again, I'm not involved in all the alternatives and details of what may have been considered. But we believe the customers are better off on EMAs.

Q. Paragraph 1 in the April 12, '85 memo is dealing with an inspection; isn't it, and an EMA?

A. Yes.

Q. And you are saying you do not know why you weren't addressing the situation on a per call

* * *

[p. 128] A. Well, again, I think what it says is that starting with the Reliant 1000, we will only make parts available to Kodak people that are servicing products for our customers or to those direct customers themselves that are servicing their own product. And it simply differentiated commercial from government, to make sure that it was clear to our people that we included both those categories.

Q. So what you are saying, in essence, is that government customers generally service their own equipment?

A. No, we are not saying that at all.

MR. PICKETT: Off the record.

(There was a discussion off the record.)

Q. Was there a particular reason why this applied just in the United States?

A. Yes, we're only inventorying parts for the United States and we were concerned with U.S. customers. I don't know how overseas parts were ordered.

Q. In looking at page 2 of the April 12, 1985 memorandum, it says in the first paragraph, "It is not our intention to ship from [p. 129] inventories that are supported by Kodak customers who purchase services from Kodak."

A. Yes.

Q. When you say inventories are supported by Kodak customers, what do you mean by that?

A. Customers that buy EMAs from Kodak give us money in return for services. So what this is saying, they are the ones that pay the bills, they've given us money to support their products, and we are taking that money and inventorying parts for them because they are the ones that are paying the bills.

Q. People on a per call basis pay for parts, don't they?

A. People on per call pay for parts, yes.

Q. Do they pay a price that is different from the prices that are attributed to parts used on an EMA?

A. Does the charge to a customer differ from the internal charge?

Q. Yes.

A. I'm not familiar with those systems.

Q. People, independent third-party service organizations pay for parts as well; is that [p. 130] correct?

A. Everybody who buys parts from us pays for parts, yes.

Q. And the prices for per call parts are the same as the prices paid by independent third-party service organizations; is that correct?

A. As far as I know.

Q. Why was it perceived or stated that these people did not support the inventories of parts?

A. What I mentioned earlier was that the people, the vast majority or the majority of the people who have EMAs pay in advance for those services. And that's the revenue that we get and that's how we are able, with that revenue we are able to inventory parts for those customers. They are our customers.

Q. And you don't consider the revenue coming in from per call or from a third-party service organization as revenue that buys parts?

A. That's revenue but that's not what we are in business for.

Q. When you say that's not what you are in [p. 131] business for, what do you mean?

A. We are in business to support our customers.

Q. Your equipment customers, people who buy equipment from you?

A. Who buy equipment and services from us, yes.

Q. But not people who are buying parts from you?

A. Again, what do you mean?

Q. People who buy parts from you are customers in a sense, in a sense of the word?

A. But they are also competitors.

Q. Yes. And that's the catch. That they are competitors?

MR. PICKETT: I object to the form of the question. What's the question? That's the catch is not a question.

MR. HENNEFER: It's a rhetorical question.

MR. PICKETT: Yes, it is. Go onto the next question.

Q. You said they are not just customers, they are competitors. What do you mean by that?

[p. 132] A. They are competing with us for service for our customers.

Q. And because they are competing with you, you don't regard their income as supporting the inventories, is that what you are saying?

MR. PICKETT: He said that there was income from EMAs that supported the inventory.

MR. HENNEFER: Right.

MR. PICKETT: You switched around the question to say "And so you don't regard the money you get for parts from either ISOs or from per call customers as revenues to you." Now, you are switching back to support. I don't think it's fair to the witness to play with his language that way.

MR. HENNEFER: What was the last question, please?

(The reporter read back the pending question.)

MR. PICKETT: I am going to object to the form of the question, because your premise for it is that the ISOs are isolated from other people who are buying parts. He said the EMAs support the inventories. Others, including ISOs and [p. 133] people who buy on per call basis, don't support the inventories.

MR. HENNEFER: He has also said with regard to ISOs they are customers but they are also competitors.

MR. PICKETT: Sure.

MR. ROMEYN: So are 3M, Bell & Howell and the other people and we don't sell parts to them either, Mr. Hennefer.

MR. HENNEFER: Mr. Romeyn, I would like to have the witness and not the witness' two counsel testify, please.

May I try my question one more time?

Q. Mr. Lacy, you stated with regard to independent service organizations that they were customers but they were also competitors. What did you mean by that?

MR. PICKETT: Asked and answered.

MR. HENNEFER: Okay, I'm going to ask him to answer it again. I think it's been interrupted so many times that I must have missed the answer.

MR. PICKETT: He said they are people who compete for services from our customers.

[p. 134] Q. And why did you differentiate between -

MR. HENNEFER: May I ask the witness to answer this question and not either one of his counsel.

MR. PICKETT: Depends if there's an objection to it. Don't answer unless I indicate there's no objection.

MR. HENNEFER: Your counsel can object but he can't answer the questions for you, Mr. Lacy.

MR. PICKETT: I can also instruct him not to answer, I can do a lot of things. So let's go ahead.

Q. Mr. Lacy, you made a distinction between customers, customers that are also competitors. Why did you differentiate those?

MR. PICKETT: Excuse me, he did not make that distinction. He said that ISOs were customers but they were also competitors. You are talking about a different distinction.

Q. Why did you make the distinction that they were customers but also competitors?

A. I guess I thought I answered that. But [p. 135] let me try again.

You say they give us revenue for the parts; that's true. But I said that they were competitors because they are competing against us for servicing users of Kodak equipment.

Q. Would you differentiate between the revenues received from people who purchased equipment from you and those who purchase parts from you that are also your competitors in servicing the equipment?

MR. PICKETT: I don't understand the question.

THE WITNESS: I don't understand it either.

MR. HENNEFER: Do you want to read the question back?

THE WITNESS: I heard what you said, but I don't understand what it is you are looking for.

(The reporter read back the pending question.)

MR. HENNEFER: I'll ask the question again.

Q. Would you make a differentiation between [p. 136] customers who are supplying you revenues by the purchase of parts on a per call basis and ISOs who are purchasing parts for servicing machines in competition with you?

MR. PICKETT: Could you read that back for me?

(The reporter read back the pending question.)

MR. PICKETT: Do you mean "would you" or "did you"? Would he now, as he sits here today?

THE WITNESS: It there a big difference between those two?

MR. PICKETT: Yes, I think there is. "Did you," did you historically in the past make that differentiation. "Would you" to me means as you are sitting here today would you make that differentiation for me.

MR. HENNEFER: That's what the question is.

MR. PICKETT: Would you make that differentiation for me?

MR. HENNEFER: Yes.

MR. PICKETT: For what purpose?

Q. Do you make that differentiation as you [p. 137] sit here today, which is what the question was.

MR. PICKETT: For any purpose?

MR. HENNEFER: Yes.

MR. PICKETT: Does he differentiate those two categories?

MR. HENNEFER: Yes.

A. Yes, there is a differentiation between those two and that's why we spelled out the policy that way we do.

Q. What is the differentiation between the two that caused you to spell out the policy the way you did?

A. Okay. A direct user of Kodak products who services it himself, has bought equipment from us, is perhaps buying supplies from us and is a customer of ours. A customer who has elected for one reason or another to

do their own service, they are giving us value, they are our customer and we are selling them on an ongoing basis products and services.

Someone who is buying them to service that customer is in a totally different category. They are not an ongoing customer of ours. They don't buy equipment from us.

* * *

[Exhibit L of Declaration of James A. Hennefer lodged separately with the Clerk.]

McCUTCHEN, DOYLE, BROWN & ENERSEN
 DONN P. PICKETT
 DANIEL M. WALL
 ALFRED C. PFEIFFER, JR.
 Three Embarcadero Center
 San Francisco, California 94111
 Telephone: (415) 393-2000
 Attorneys for Defendant
 Eastman Kodak Company

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL)	
SERVICES, INC., et al.,	)	No. C 87 1686 WWS
Plaintiffs,)	
)	
v.)	
)	
EASTMAN KODAK)	
COMPANY,)	
)	
Defendant.)	

KODAK'S REPLY MEMORANDUM

Date: February 26, 1988
 Time: 11:00 a.m.
 Place: Judge Schwarzer's
 Courtroom

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I. INTRODUCTION

As an example of an attempt to avoid summary judgment by creating dozens of immaterial factual disputes,

plaintiffs' response to Kodak's motion is a *tour de force*. The litany of anecdotal complaints about "vicious" and "ruthless" Kodak conduct, often based on patently inadmissible evidence,¹ is practically endless. A point-by-point rebuttal of these allegations would take forever.

But there is no need for that. What is needed in this case — and what is missing entirely from plaintiffs' response — is a straightforward application of substantive antitrust law principles to the undisputed facts. Plaintiffs have largely conceded the material factual issues, making it clearer than ever that summary judgment is appropriate.

Although plaintiffs attempt to obscure it, this case presents only two questions. The first, and most important, is whether the antitrust laws require Kodak to sell replacement parts to independent service organizations ("ISOs") so that they can compete against Kodak. The second is whether the antitrust laws require Kodak to guarantee the availability of service on equipment sold by used equipment dealers.²

¹ The admissibility issues presented by plaintiffs' response — for example, citing to declarations which the witnesses refused to sign — are addressed in a motion to strike filed herewith.

² The role of Kodak's used equipment policy in this case appears to have changed from what was alleged in the complaint. Plaintiffs no longer argue that the policy independently violates the antitrust laws. They contend instead that it enhances the effect of Kodak's parts policy. *See, e.g., Pltfs. Mem.* at 17. The change in emphasis is immaterial since under no circumstances does Kodak have a duty to guarantee service on equipment which it does not sell. *See, Kodak Mem.* at 42-43.

The antitrust laws impose no such duties on Kodak. To the contrary, at least since *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), the antitrust laws have respected the right of a manufacturer "freely to exercise his own independent discretion as to parties with whom he will deal." In *Bushie v. Stenocord Corp.*, *Calculators Hawaii, Inc. v. Brandt, Inc.*, and *Dimidowich v. Bell & Howell*, the Ninth Circuit reaffirmed that principle on facts nearly identical to this case. (See, Kodak's opening brief ("Kodak Mem.") at 22-28.) Those and many other cases establish that a manufacturer, acting unilaterally, must deal with its rivals (or its rivals' customers) only in rare circumstances, and only when the manufacturer has or might obtain market power over the product it sells. Therefore, the dispositive issue in this case is whether Kodak has market power in the markets for the sale of copiers and micrographics equipment. If it does not, nothing else in this case matters.³

II. ARGUMENT

A. The Existence or Non-Existence of a Kodak Service Market is Immaterial.

The centerpiece of plaintiffs' attack on Kodak's parts policy is a nearly twenty page argument that there are

³ Of course, proof of market power alone does not make out an antitrust case. To avoid summary judgment, plaintiffs must also offer proof of anticompetitive acts by Kodak and they cannot do that. Even if Kodak had market power, it would not have a duty to assist plaintiffs by supplying them with parts. See, e.g., *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), cert. denied, 107 S. Ct. 1574 (1987). The Court need not resolve that issue, however, because it is so obviously indisputable that Kodak lacks market power.

discrete markets for servicing Kodak brand copiers and micrographic equipment — the markets Kodak is allegedly monopolizing. See *Pltfs. Mem.* at 4-6, 27-39. That discussion is completely unnecessary.

Contrary to plaintiffs' assertion, Kodak does not base this motion on the ground that a Kodak service market does not or cannot exist as a matter of fact or law. Our motion has a different basis, and as we said repeatedly in our opening papers (at pp. 8, 27 n.4 & 31) summary judgment is appropriate whether or not there are Kodak service markets.

That is because no matter how it is styled, this is a leveraging case. Plaintiffs' refusal to deal theory and their tying theory are both leveraging theories. The crux of those theories is that Kodak has market power in upstream markets, the equipment markets, that it is using to monopolize downstream markets, (what plaintiffs call "associated aftermarkets"). i.e., the alleged Kodak service markets. If Kodak does not have market power in the upstream markets, it does not matter what other markets it is trying to monopolize. Its attempt will inevitably fail and consumers will not be harmed. In such a case, the existence and contours of the downstream markets are irrelevant.

The law recognizes this. Sixteen years ago, the Ninth Circuit in *Bushie v. Stenocord* rejected the notion that a manufacturer which faces interbrand equipment competition could be found to monopolize a market for the service of its own equipment. The Fifth Circuit did the same thing in *Spectrofuze Corp. v. Beckman Industries, Inc.*, 575 F.2d 256 (5th Cir. 1978), cert. denied, 440 U.S. 939

(1979). The Fourth Circuit has just done so in *Nobel Scientific Industries, Inc. v. Beckman Industries, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 67,809 (4th Cir. Oct. 27, 1987), *aff'g and adopting*, 670 F. Supp. 1313 (D. Md. 1986). Moreover, in *Calculators Hawaii* and *Dimidowich*, the Ninth Circuit rejected monopolization challenges to parts policies nearly identical to Kodak's.

These courts realized that restricting the sale of parts or supplies to service providers cannot harm consumers if the manufacturer faces interbrand equipment competition. This is stated most clearly in the recent *Nobel Scientific Industries* case. There, defendant Beckman was charged with monopolizing an alleged market for Beckman brand reagents, chemicals used in Beckman brand blood analyzers to detect particular substances in the blood. The court granted summary judgment for the defendant because it was indisputable that Beckman blood analyzers faced competition from other manufacturers. Hence, "if the overall cost of operating an analyzer, whether due to reagent cost, service costs or otherwise, is too high, then a hospital or lab will switch to purchase of another company's equipment." 670 F. Supp. at 1321. This prevented any possible anticompetitive effect in any reagent market.⁴

⁴ The *Nobel* court concluded that the reagent market could not be limited to Beckman reagents, and that Beckman lacked market power in the broader reagent market. While the latter was undoubtedly true, it was unnecessary for the court to identify the parameters of reagent competition. Analyzer competition prevented Beckman from exerting market power in any reagent market, however defined.

Plaintiffs' complaint acknowledged that this is the correct analysis by alleging that Kodak has a "brand monopoly," i.e., that its products do not compete with similar products sold by Xerox, IBM, 3M, etc. However, now that they have had full discovery on that issue, plaintiffs no longer pursue their argument. Consequently, all of the record evidence establishes that Kodak does face intensely competitive equipment markets. See *Kodak Mem.* at 4-7. All of the record evidence establishes that buyers of copiers and micrographic equipment consider service costs when purchasing equipment. (Murray Decl. at 13, 15; Lacy Decl. at 14) And all of the record evidence establishes that Kodak recognizes this by pricing its service contracts to be competitive with its equipment competitors. (Murray Decl. at 15; Lacy Decl. at 16)⁵ Under all of the authorities cited above, that is the end of this case.

B. Plaintiffs' "Lock-In" Theory is Without Merit.

The only theory plaintiffs advance to explain how Kodak might obtain monopoly profits is the so-called

⁵ At one point, plaintiffs suggest that Kodak's service prices must be supracompetitive because ISOs are able to service Kodak equipment for less than Kodak charges and still make a profit. *E.g., Pltfs. Mem.* at 6. There are numerous reasons why that facile analysis does not prove supracompetitive pricing. One is that ISOs are free-riders. Free-riders can always undercut the prices of their competitors because they do not bear the costs associated with demand-enhancing functions such as training, promotion, and higher quality service. That is what makes them free-riders.

"lock-in" theory. Plaintiffs claim that *existing* Kodak customers (not new prospects) are subject to supra-competitive service pricing because they cannot feasibly switch to competitive equipment. The theory is legally, conceptually and factually groundless.

The only potential legal support for such a theory is the Ninth Circuit's controversial decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985).⁶ *Digidyne* was a tying case which held that the inability of existing Data General customers to switch to competitive equipment could, together with several other factors, support a jury's determination that Data General had tying market power. It does not help these plaintiffs.

First, *Digidyne* itself establishes that the lock-in theory applies only to tying cases and not to monopolization cases. A major issue in *Digidyne* was whether plaintiff had to show that Data General had market power throughout the tying product market (the market in which Data General's "RDOS" system was sold) or

⁶ *Digidyne's* analysis has been expressly rejected by both the Sixth and Seventh Circuits. See, *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n. 4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). In addition, Justices White and Blackmun — two of the five Justices who favor retention of the *per se* rule in tying cases — would have granted certiorari in *Digidyne*. See, 473 U.S. 908 (White, J., joined by Blackmun, J., dissenting from denial of certiorari). The Ninth Circuit itself criticized and narrowly interpreted *Digidyne* in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 n. 4 (9th Cir. 1987). It is not a case to be read expansively.

merely over some buyers in that market. The court ruled that in a *per se* tying case the latter sufficed, and distinguished this from monopolization cases, in which a showing of power "in the whole of the relevant market" is required. 734 F.2d at 1339 & 1340-41, citing, *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Obviously, one cannot prove market power throughout an entire market by arguing a lock-in, since by definition a lock-in only affects those consumers who already own the defendant's product. Neither *Digidyne* nor any other case suggests that a lock-in can establish the monopoly power required in a Section 2 case.

Second, *Digidyne* does not support plaintiffs' argument that a lock-in can by itself support a showing of market power. In fact, it strongly implies the contrary. Data General argued that lock-in was irrelevant in determining its market power because buyers were aware of the potential lock-in when initially selecting Data General's product and could choose not to lock themselves in. *Id.* at 1342. The Ninth Circuit did not quarrel with the logic of this argument, which would render a lock-in meaningless in a case where the defendant did not have point-of-sale leverage. Rather, it found that factors other than the lock-in gave Data General that initial leverage. *Id.* at 1343 (citing the copyright protection of Data General's product, its "special attraction," trade secret barriers, and other barriers to the development of comparable products). Here, plaintiffs concede the fact of interbrand competition at the initial point of sale, and they do not rebut Kodak's evidence that copier and micrographics equipment customers consider long term service costs when choosing between Kodak and its

equipment competitors. Nothing in *Digidyne* suggests that a lock-in can prove market power under those circumstances.

Third, plaintiffs here have nowhere near the type of lock-in evidence that *Digidyne* had. Data General's RDOS system (the tying product) was sold primarily to original equipment manufacturers who combined it with application software and hardware to create a complete computer system for resale. The OEMs developed application software at substantial expense, often millions of dollars, and specifically tailored it to be compatible with RDOS, and only RDOS. The time required and the expense (90% of the original development costs) rendered it impossible for an OEM to abandon the RDOS system, around which they had built their businesses. Indeed, the lock-in was so effective that no existing Data General OEM customer had ever switched to competitive equipment. *Id.* at 1342 & n.4.

Plaintiffs' case is nothing like that. Consider copiers first. The *only* evidence that plaintiffs offer suggesting that Kodak copier customers are locked-in is that the resale value of used equipment is low relative to its original sales price. That is not a factor mentioned in *Digidyne*, and it is a wholly insufficient basis upon which to find a lock-in. The fact is that almost every product has a lower "used" price than its "new" price; it is practically American folklore that an automobile loses value the minute it leaves the showroom.⁷ But that does not and

⁷ Of course, because this phenomenon is so well known, consumers can be expected not to buy durable goods unless they are satisfied that they are not committing to a poor or costly product. This is the point that the Ninth Circuit noted, and seemed to concede, in *Digidyne*, 734 F.2d at 1342.

cannot mean that every manufacturer of a product that loses value has market power. If it does mean that, the lock-in exception will swallow the rule that point-of-sale competition negates a finding of market power.

Moreover, as plaintiffs make the argument, it proves too much. Plaintiffs claim that a copier selling for \$75,000 new has a \$2,500 resale value after two to three years, or just twenty percent of its 14 year useful life. *Pltfs. Mem.* at 15. If that were true — if one could really purchase eighty percent of the value of a copier for less than four percent of its original price — no consumer would ever buy a new copier. (Plaintiffs concede that used copiers compete with new copiers.) Kodak would be forced to lower its equipment prices drastically, and would thereby essentially give back (albeit in advance) any monopoly profits that it might be able to earn from parts and service sales. The consumer would be none the worse for it.⁸

⁸ Of course, in the real world none of this happens. Plaintiffs' argument is built upon the assumption that because Kodak will service a copier for up to 14 years, that is the useful life of a copier. That is nonsense. Kodak entered the copier market only thirteen years ago (*Murray Decl.* ¶ 1); surely plaintiffs would not claim that every copier Kodak ever made is still within its useful life. In fact, plaintiffs' argument is a contrivance. The Court may recall that at the initial status conference in this case plaintiffs' counsel claimed that technological change, *i.e.*, obsolescence, meant that the useful life of Kodak equipment was "four or five years," as a result of which plaintiffs were unable to make their own parts since they could not keep current with the latest equipment. The Court responded that counsel had argued himself out of court because a short useful life negated the effects of any lock-in.

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With respect to micrographics equipment (but not copiers), plaintiffs also argue the theory of lock-in through compatibility requirements that was pressed in *Digidyne*. They allege that Kodak equipment uses record indexing systems which cannot be used with competitive retrieval equipment, thereby stranding a customer's existing records if he switches from Kodak to another vendor. Plaintiffs' argument is so wrong as to be deceptive.

Plaintiffs fail to inform the Court that virtually all micrographic equipment sold today uses a "blip" indexing system conforming to a standard published in 1979 by the American National Standards Institute ("ANSI") and the National Micrographics Association ("NMA"). See *Document Mark (Blip) Used in Image Mark Retrieval Systems*, ANSI/NMA MS8-1979 (approved 9/13/79), attached as Ex. 1 to Declaration of Theodore R. Spies, dated February 10, 1988, filed herewith. The purpose and effect of this standard, which Kodak strongly supported, was to facilitate interfaces between equipment from different vendors. The coding mark adopted, the blip, has been utilized by all equipment makers for many years, allowing consumers to mix and match equipment from different vendors as they please. Over *ninety-nine percent* of all of the automated retrieval equipment sold today is

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Now plaintiffs have completely reversed themselves and tripled the useful life of the equipment. As it is based on an apples-to-oranges comparison equating service availability to useful life, and as it leads to absurd results, plaintiffs' evidence is entitled to no weight.

blip equipment, and over *ninety-five percent* of the automated retrieval devices presently in use utilize blips. (Spies Decl. ¶ 5) There is no possibility that plaintiffs are ignorant of the predominance of blip coding, yet they make no mention of it in their papers.

Instead, plaintiffs claim that Kodak's customers are locked-in because of the uniqueness of Kodak's "Miracode" and "Oracle" indexing systems. This is disingenuous. The fact is that Kodak stopped offering the Miracode system over ten years ago, in 1978. (Spies Decl. ¶ 8) Today, there are *less than fifteen* Miracode systems operating in the entire world. (*Id.*) Moreover, contrary to plaintiffs' argument, even this tiny group of customers may access their Miracoded records with blip retrieval devices if they wish. (*Id.*)

The facts about the Oracle system are similar. Kodak presently offers Oracle indexing and that system is unique. But plaintiffs fail to mention two key facts. First, Kodak's Oracle sales are only a small fraction of its total sales. In 1987 less than five percent of Kodak's total sales of automated retrieval equipment were Oracle sales. (Spies Decl. ¶ 9) Kodak estimates that less than 15% of its existing customers use Oracle — a marked contrast from *Digidyne* where 93% of Data General's RDOS customers were supposedly locked-in. Second, the fact is that one *can* access Oracle coded film on non-Kodak retrieval devices. Devices to facilitate just that are available on the market at a reasonable cost. (Spies Decl. ¶ 10) Thus, not even the small minority of existing Kodak customers who use Oracle are locked-in to Kodak due to any compatibility difficulties.

The ultimate proof that Kodak customers are not locked-in is the fact that Kodak regularly loses existing customers to its equipment competitors. Canon and Minolta in particular have built their micrographics market share largely at Kodak's expense, something which simply could not happen if plaintiffs' theory were true. (Spies Decl. ¶ 11) Moreover, as is true in the copier industry, it is commonplace for micrographics customers to use multiple vendors to satisfy their needs (*id.*), again something which is totally inconsistent with plaintiffs' theory of the case. The only possible conclusion on this undisputed evidence is that there is no economically significant lock-in in the micrographics industry.

Finally, even if the Court were to assume that some existing Kodak customers are locked-in, it would still be impossible to conclude that Kodak has market power. Whenever only a portion of a firm's customers are subject to a lock-in, competition for new or non-locked-in customers prevents the firm from extracting monopoly prices from its existing customers. That is because competition for new customers (or those otherwise free of any lock-in) sets the market price. Under those circumstances, the only way an incumbent firm can extract monopoly prices is through price discrimination; *i.e.*, it must be able "to charge a higher price to existing customers than to new ones." F.M. Fisher *et al.*, *Folded, Spindled, and Mutilated: Economic Analysis and U.S. v. IBM* (MIT Press 1983) at 202 (excerpts found in Authorities Appendix).⁹ Plaintiffs

⁹ The same is true where, as here, customers stagger their purchases over time so that they are frequently buying some

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do not even contend, let alone offer evidence, that Kodak engages in such price discrimination, and they concede that there is vigorous competition for new customers. The only possible conclusion is that interbrand equipment competition prevents Kodak from having or exerting any market power, even over its existing customers.

C. There is No Evidence of Any Concerted or "Hybrid" Refusal to Deal

Plaintiffs' conspiracy case appears to be totally make-weight. Despite the grandiose allegations of the complaint, plaintiffs produced *no* evidence of the *Dimidowich*-type "hybrid" conspiracy they alleged. Their brief claims that Kodak has agreements with unnamed service bureaus-moonlighting-as-ISOs not to sell other ISOs replacement parts, *Pltfs. Mem.* at 9, but there is not a word of this in the declarations. This utter failure of proof mandates summary judgment.

Plaintiffs' declarants do state that they have been unable to get parts directly from Kodak's parts suppliers, and they claim to have been told by some suppliers that

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new equipment. A firm wishing to charge supracompetitive service prices must be willing to lose the replacement equipment sales — and, of course, the future parts and service revenues that would follow from those sales. The undisputed evidence in this case is that replacement or upgrade business is a major opportunity for copier and micrographics equipment makers, and that Kodak would not jeopardize its ability to make those sales by charging supracompetitive prices for service. (See Lacy Decl. ¶ 18; Murray Decl. ¶ 16)

their refusal to sell parts is pursuant to agreements with Kodak. The obvious hearsay problems with this evidence are addressed by separate motion. However, even if the Court considers the evidence, it does plaintiffs no good. An agreement between an input supplier and a manufacturer is a paradigm vertical arrangement, and as such is subject to the rule of reason.¹⁰ *Bushie*, 460 F.2d at 120, *Calculators Hawaii*, 724 F.2d at 1337, and *Dimidowich*, 803 F.2d at 1481 n. 4, all establish that a manufacturer's refusal to sell replacement parts, even pursuant to a vertical conspiracy, is lawful.¹¹

D. There Has Been No Tying.

This Court has previously noted how tying cases often become "a semantic shell game" in which litigants spend more time "fractionating the [relevant product] into separate components" rather than dealing with economic realities. *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561, 1565 n.4 & 1566 (N.D. Cal. 1984). That is certainly true here. Plaintiffs have rearranged the shells again and

¹⁰ Plaintiffs also claim that Kodak secured agreements from some of its customers (again unnamed) that they would not resell parts to ISOs. That would also be a purely vertical conspiracy.

¹¹ It is noteworthy that plaintiffs concede that the parts suppliers' refusals to sell them parts were based on the parts being proprietary to Kodak. See, e.g., Hernandez Decl. Ex. D. Surely the antitrust laws do not force Kodak to allow its parts suppliers to release proprietary goods and technology to Kodak's competitors.

now allege two tie-ins where parts are the tying product.¹² First, they claim that Kodak uses its control over parts to force consumers to buy Kodak equipment, and second, they allege that Kodak uses its control over parts to force consumers to buy Kodak service.

It is absurd to analyze this case as if parts are the tying product. The very notion that a consumer could be forced to buy a \$75,000 copier so that they could get a \$10 replacement part is preposterous. Yet, if one assumes that parts are the tying product, the relevant inquiry is whether that is possible.

Obviously, that is letting the tail wag the dog. Kodak does not sell parts because there is a demand for parts distinct from the demand for its equipment. It sells parts because its equipment is made of those parts, and occasionally it is necessary to replace something. Similarly, there is no demand for parts distinct from the demand for service. Parts have no utility or economic value unless they are used to service the equipment that is made up of those parts. Parts are not a separate product to which either equipment or service can be tied.¹³ See, *Casey*, 590 F. Supp. at 1566.

¹² Plaintiffs originally alleged that Kodak tied parts and service to equipment (Complaint ¶¶ 57-58), but they have now abandoned those theories.

¹³ Plaintiffs actually concede the point since their sole argument on the separate products issue (*Pltfs. Mem.* at 42-43) is that equipment and service are separate products. That has nothing to do with whether parts and equipment are separate products or whether parts and service are separate products.

In any event, equipment and service are not tied to the sale of parts. While it is true that one's eligibility to buy parts is dependent on prior purchases of the associated equipment, no Kodak customer has ever been forced to buy equipment or service so that they could buy a part. If a customer is eligible to buy parts, he may do so without any additional obligation to buy Kodak equipment or service. There is no tie.

E. Plaintiffs' Unfair Conduct Allegations Do Not Impeach Kodak's Business Justifications or Prove Anticompetitive Intent.

Kodak's declarations establish that its parts policy was adopted to foster the legitimate business purposes of maintaining direct responsibility for service, reducing inventories, and not supporting free-riding. They also establish that the used equipment policy is designed to protect Kodak from the adverse financial consequences of placing equipment of unknown condition under a fixed-price maintenance agreement. These business justifications entitle Kodak to summary judgment even if it has market power or has engaged in tying. See *Kodak Mem.* at 28-31; *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1348 (9th Cir. 1987) (defendant "may demonstrate a business justification for an otherwise per se illegal tying arrangement").

Plaintiffs' response to these business justifications is a rhetorically charged argument that Kodak is really trying to put ISOs and used equipment brokers out of business, that it has disparaged them, and that Kodak officials

have expressed animosity toward them.¹⁴ The short answer to these charges is, "So what?" The antitrust laws do not forbid animosity between competitors and they certainly do not forbid competitors from employing legitimate means to put each other out of business. As Judge Peckham noted in *General Communications Engineering, Inc. v. Motorola Communications and Electronics, Inc.*, 421 F. Supp. 274, 286 (N.D. Cal. 1976), "the very nature of unfettered competition is exclusionary." More recently, Judge Posner made the same point in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1574 (1987). There, the plaintiff claimed that Western Union, which was assumed to have monopoly power, had improperly denied plaintiff access to an important vendor list after having allowed access initially. The plaintiff made much of Western Union's subjective intent, as evidenced by a document stating that Western Union wanted to "flush these turkeys."

That Western Union wanted to "flush these turkeys" tells us nothing about the lawfulness of its conduct. Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and

¹⁴ Plaintiffs also claim that Kodak's micrographics parts policy is discriminatory in practice because some ISOs, often employing subterfuge, manage to circumvent it. This is nothing new. Kodak admitted in its opening papers (see *Lorenson Decl.* ¶¶ 13-17) that its enforcement mechanisms are incapable of policing the policy with 100 percent effectiveness. But Kodak's failings benefit plaintiffs. Using their dog's name or some other ploy, they get the parts they want. Surely that does not make Kodak's policy worse (from plaintiffs' perspective) than if Kodak were to police it more effectively.

getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run. Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty to continue it indefinitely. * * * The question therefore is not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawal was an objectively anticompetitive act. It was not

Id. at 379-80. The same comment applies here.¹⁵

As to plaintiffs' allegations of disparagement and other "unfair" conduct, they are simply not the stuff of which an antitrust case is made. Judge Peckham's decision in *General Communications Engineering* squarely holds that disparagement and unfair conduct do not constitute antitrust violations. 421 F. Supp at 289-90. If plaintiffs feel they have been disparaged or treated unfairly, they can pursue their claim, and Kodak will respond to it, in state court.

F. Additional Discovery is Unnecessary

At the conclusion of the December 21 telephone status conference, the Court ordered plaintiffs to state in

¹⁵ *Western Union* also answers plaintiffs' claim that they relied on the so-called "Replacement Parts Principles" or other representations by Kodak personnel that they could buy parts. See, e.g., *Pltfs. Mem.* at 22. If they did, they have at best a contract or tort claim, but not an antitrust case.

their summary judgment papers what specific additional discovery they want before the Court rules on this motion. *Order*, 1/4/88 ¶ 4. Counsel was directed to follow the requirements of Rule 56(f) as stated in the relevant case law. Those cases establish that it is plaintiffs' burden to state specifically what evidence they seek, and "to put forth sufficient facts to show that the evidence sought exists." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987).

Plaintiffs have not met that standard. Their counsel's declaration, which is the whole of their Rule 56(f) case, states little more than the hope that plaintiffs could get more evidence and could cure the evidentiary problems with their existing case if only they had more time. Indeed, in a paragraph that simply flaunts the Rule, counsel incorporates the Table of Contents to his brief in order to "specify" the issues on which additional discovery is needed. (Hennefer Decl. ¶ 21) That cannot possibly be sufficient.

It doesn't matter anyway. The fact is that on the one issue that really matters — market power in the inter-brand equipment markets — plaintiffs do not even seek additional discovery. They practically had to be forced to take the discovery which they have had on that issue, and then they did not cite to any of it in their brief. Rather, plaintiffs have chosen to stand or fall on a theory of the case that ignores market power in the interbrand equipment markets. That was their choice to make, and they made it. But no amount of discovery can change the fact that the theory is contrary to the law. Rule 56(f) does not require additional discovery where, as here, plaintiffs' claim is doomed to fail in any event. *Wallace v. Brownwell*

Pontiac-GMC Co., Inc., 703 F.2d 525, 528 (11th Cir. 1983);
Colan v. Prudential-Bache Securities, Inc., 577 F. Supp. 1074,
1084 (N.D. Ill. 1983).

III. CONCLUSION

Notwithstanding plaintiffs' attempt to obscure the matter with a blizzard of irrelevant facts, this case comes down to a question of duty: does Kodak have a duty to render positive assistance to ISOs by selling them parts, or a duty to render positive assistance to equipment brokers by blindly servicing the equipment they sell no matter what its condition. Questions of duty are inherently questions of law. Where, as here, it is undisputed that Kodak has no market power to exploit against anyone, it is indisputable that it has no duty to assist the plaintiffs. Kodak is entitled to summary judgment.

Dated: February 12, 1988.

Respectfully submitted,
McCUTCHEN, DOYLE, BROWN
& ENERSEN
DONN P. PICKETT
DANIEL M. WALL
ALFRED C. PFEIFFER, JR.

By /s/ Daniel M. Wall
Daniel M. Wall
Attorneys for Defendant
Eastman Kodak Company
